Supreme Court, U.S.
FILED
JAN 21 2011
OFFICE OF THE CLERK

No. 10-952

In the

Supreme Court of the United States

BLUE MOVIES, INC. D/B/A/ LOVE BOUTIQUE, ET AL.,
Petitioners,

v.

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Kentucky Supreme Court's Opinion violated the Supremacy Clause and the Fourteenth Amendment's incorporation of the First Amendment by interpreting and applying state constitutional law in a manner that is more restrictive than that which is guaranteed by the First Amendment of the United States Constitution, as demonstrated by the Kentucky Supreme Court's omission of the "proportionality" analysis when considering secondary effects challenges, an analysis which is mandated by Justice Kennedy's concurring – and controlling – opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and an analysis which has been adopted and applied in a significantly more demanding and speech-protective manner by several recent opinions by the United States courts of appeals?

2. Whether the Kentucky Supreme Court's Opinion suggesting that the Twenty-First Amendment confers an added presumption of validity in favor of alcohol regulations, which thereby trumps Petitioners' interests despite the otherwise invalid restrictions on Petitioners' First Amendment protections, is in conflict with relevant decisions of this Court, including *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners are:

(1) Blue Movies, Inc. d/b/a *Love Boutique*;

(2) Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*;

(3) Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub*;

(4) Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; and

(5) Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*.

Respondent is the Louisville/Jefferson County Metro Government.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosures:

(1) Blue Movies, Inc. d/b/a *Love Boutique* is 80% owned by Imagination Corporation, which is 100% owned by a personal trust. Neither Imagination Corporation nor any of the other owners of Blue Movies, Inc.'s stocks are publicly held companies.

(2) Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch* is 100% owned by a personal trust. Taylor Boulevard has no parent corporations, and no public company owns more than ten percent of Taylor Boulevard's stock.

(3) Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub* is owned by VCG Holding Company, a publicly held company. No other publicly held company owns more than ten percent of Kentucky Restaurant Concepts, Inc.'s or VCG Holding Company's stock.

(4) Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* is 100% owned by a personal trust. Taylor Boulevard has no parent corporations, and no public company owns more than ten percent of Taylor Boulevard's stock.

(5) Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar* has no parent corporations, and no public company owns more than ten percent of Win Place and Show Bar, Inc.'s stock.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES viii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE KENTUCKY SUPREME COURT'S INTERPRETATION OF FEDERAL SECONDARY EFFECTS ANALYSIS MISCONSTRUES THIS COURT'S CONTROLLING PRECEDENT AND IS IN CONFLICT WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SEVERAL OTHER COURTS, AND, AS SUCH, THIS COURT

SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THE CONFLICT AND BRING CLARITY TO THIS CONTENTIOUS, CONFUSING, AND OFT-RECURRING AREA OF CONSTITUTIONAL LAW 10

II. THE KENTUCKY SUPREME COURT'S DETERMINATION THAT THE ALCOHOL RESTRICTIONS IN CHAPTER 111 ARE CONSTITUTIONAL CONFLICTS WITH THE RELEVANT DECISION OF THIS COURT IN *44 LIQUORMART, INC. V. RHODE ISLAND* 23

CONCLUSION 25

APPENDIX

VOLUME 1

Appendix A: Opinion of the Court by Justice Schroder Affirming in Part, Reversing in Part and Remanding, Supreme Court of Kentucky, (April 22, 2010) 1a

Appendix B: Opinion Affirming in Part and Reversing in Part, Commonwealth of Kentucky, Court of Appeals, (October, 5, 2010) 40a

Appendix C: Opinion and Order, Jefferson Circuit Court, Division Six, (December 14, 2004) 140a

Appendix D: Order Denying Petition for Rehearing, Supreme Court of Kentucky, (August 26, 2010) 166a

Appendix E: Louisville/Jefferson County Metro Government, Metro Code, Chapter 111 ..... 168a

Appendix F: United States Constitution
Amendment I 212a
Amendment XIV 212a
Amendment XXI 214a

VOLUME 2

Appendix G: Intervening Plaintiffs' Verified Complaint for Declaratory Relief, Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Attorney Fees, Jefferson Circuit Court, (December 3, 2003) 215a

Appendix H: Brief of Appellants/Cross-Appellees, Commonwealth of Kentucky, Court of Appeals, (March 3, 2006) 241a

Appendix I: Motion for Discretionary Review, Commonwealth of Kentucky, Supreme Court, (November 2, 2007) 330a

Appendix J: Order Granting Discretionary Review, Supreme Court of Kentucky, (April 16, 2008) 349a

Appendix K: Brief of Movants-Appellants, Commonwealth of Kentucky, Supreme Court, (June 24, 2008) 351a

TABLE OF CITED AUTHORITIES

CASES: **PAGE**

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1986) 23, 24, 25

729, Inc. v. Kenton County Fiscal Court,
515 F.3d 485 (6th Cir. 2008) 14, 16

Abilene Retail #30, Inc. v. Dickinson County,
492 F.3d 1164 (10th Cir. 2007) 19

Annex Books, Inc. v. City of Indianapolis,
581 F.3d 460 (7th Cir. 2009) 16, 18, 19, 20

Arizona v. Stummer,
194 P.3d 1043 (Az. 2008) 17

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 11, 12

Ben's Bar, Inc. v. Village of Somerset,
316 F.3d 702 (7th Cir. 2003) 16

Blue Movies, Inc. v. Louisville/Jefferson County Metro Government,
317 S.W.3d 23 (Ky. 2010) 1

Byram v. United States,
705 F.2d 1418 (5th Cir. 1983) 13

Center for Fair Public Policy v. Maricopa County,
336 F.3d 1153 (9th Cir. 2003) 16, 17

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 11, 12

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) ..... *passim*

City of Newport v. Iacobucci,
479 U.S. 92 (1986) 23, 24

Commonwealth v. Jameson,
215 S.W.3d 9 (Ky. 2006) 17, 22

Elk Horn Coal Corp. v. Cheyenne Resources, Inc.,
163 S.W.3d 408 (Ky. 2005) 11

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003) 16

Gregg v. Georgia,
428 U.S. 153 (1976) 16

Marks v. United States,
430 U.S. 188 (1977) 16

New Albany DVD, LLC v. City of New Albany,
581 F.3d 556 (7th Cir 2009) ..... *passim*

New York State Liquor Comm. v. Bellanca,
452 U.S. 714 (1981) 23, 24

Peek-A-Boo Lounge v. Manatee County,
337 F.3d 1251 (11th Cir. 2003) 16

Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.,
460 U.S. 37 (1983) 13

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 11, 12, 13

Restaurant Ventures LLC v. Lexington-Fayette Urban County Government,
60 S.W.3d 572 (Ky. App. 2001) 17, 22

Richland Bookmart, Inc., v. Nichols,
137 F.3d 435 (6th Cir. 1998) 13

Sable Communications of California, Inc. v. FCC,
492 U.S. 115 (1989) 13

SOB, Inc. v. County of Benton,
317 F.3d 856 (8th Cir. 2003) 16

United States v. O'Brien,
391 U.S. 367 (1968) 6, 12, 13

Widmar v. Vincent,
454 U.S. 263 (1981) 13

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. I ..... *passim*
U.S. CONST. amend. XIV 2
U.S. CONST. amend. XXI 2, 8, 23, 24

STATUTES, LEGISLATIVE HISTORY, AND ORDINANCES:

28 U.S.C. § 1257 2

Louisville/Jefferson County Code of Ordinances,
Chapter 111 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Blue Movies, Inc. d/b/a Love Boutique, et al., respectfully pray that a writ of certiorari be issued to review the Opinion of the Kentucky Supreme Court entered in this proceeding on April 22, 2010.

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court is reported as *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23 (Ky. 2010). App. 1-39. The August 26, 2010 Order of that court denying a Petition for Rehearing is unreported and is found at App. 166-67. The October 5, 2007 Opinion of the Kentucky Court of Appeals, upholding all of the challenged provisions, is also unreported and appears at App. 40-139. The December 14, 2004 Opinion and Order of the Jefferson Circuit Court granting a temporary injunction to Petitioners as to two challenged provisions of the relevant ordinance, and granting summary judgment to Respondent as to all other challenged provisions, is reproduced at App. 140-65.

JURISDICTION

The Kentucky Supreme Court's Opinion was issued on April 22, 2010. App. 1-39. The Kentucky Supreme Court denied Petitioners' timely filed Petition for Rehearing by Order dated August 26, 2010. App. 166-67. On November 12, 2010, Petitioners timely filed an Application for Extension of Time to File Petition for Writ of Certiorari. This Court, per Justice Kagan, granted the requested extension on November 16, 2010, thereby extending the time for filing the instant

Petition for Writ of Certiorari to and including January 23, 2011. Petitioners are filing this Petition for Writ of Certiorari on or before the extended deadline of January 23, 2011. This Court therefore has jurisdiction to review the ruling of the Kentucky Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 212, the text of the Fourteenth Amendment is reproduced at App. 212-14, and the text of the Twenty-First Amendment is reproduced at App. 214. Chapter 111 of the Louisville/Jefferson County Code of Ordinances (the regulatory scheme that was challenged by Petitioners below) appears at App. 168-211.

STATEMENT OF THE CASE

Petitioners are various businesses located in and around the Louisville/Jefferson County, Kentucky area, which are either: (a) retail facilities that present, sell, and rent to the consenting adult public a variety of presumptively protected sexually explicit but non-obscene expressive materials and/or (b) liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license), which present to the consenting adult public a variety of female exotic dance entertainment where entertainers perform fully clothed, "topless," and/or fully nude. App. 3.

Respondent Louisville/Jefferson County Metropolitan Government ("Metro") is the

governmental and law-making body that was formed in January 2003 when the City of Louisville, Kentucky and Jefferson County, Kentucky merged into one governmental entity.

On March 1, 2004, Metro enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance," a copy of which is found at App. 168-211). Among other things, the Ordinance: (1) requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); (2) provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); (3) requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); (4) precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); (5) precludes establishments presenting such dancing from having a liquor license (§ 111.3); (6) prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); (7) precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B));

(8) prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); (9) prohibits entertainers, even while "semi-nude" (*i.e.*, while clothed), from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and (10) provides for penalties for violating the Ordinance, including license suspension and/or revocation, civil fines, misdemeanor conviction (punishable by a fine of $250.00 to $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99). App. 168-211.

On March 5, 2004, Petitioners Kentucky Restaurant Concepts Inc., d/b/a PT's ("PT's") and Blue Movies, Inc., d/b/a Love Boutique ("Blue Movies") filed suit in Jefferson Circuit Court challenging the Ordinance on numerous constitutional grounds and seeking a temporary restraining order and preliminary and permanent injunctive relief. App. 141. In June and July of 2004, the various other establishments which are Petitioners here were granted permission to intervene as plaintiffs in the trial court. In the Intervening Plaintiffs' Verified Complaint, Petitioners raised the federal questions sought to be reviewed here, alleging that the Ordinance is "unconstitutional, both facially and as applied, and is in violation of [Petitioners'] First, Fifth, Ninth, and Fourteenth Amendment rights under the United States Constitution and their corollary rights under the Kentucky Constitution." App. 229-33, 216-17. Indeed, as will be shown in this Petition, even when making

state law or state constitutional claims, Petitioners rested their arguments on federal authority – and the state courts analyzed these claims accordingly – because, as is now essentially black letter law, state constitutional protections cannot afford less protections that those guaranteed by corollary federal constitutional rights. *See, e.g.*, App. 266.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. Thereafter, Metro removed the case to federal court and Petitioners then filed a motion to remand, which was granted by the federal court. App. 141. Following the remand, Metro then filed a motion for summary judgment and Petitioners filed a supplemental brief in support of their motion for temporary injunction. App. 141.

On December 14, 2004, the circuit court entered a final and appealable Opinion and Order granting Petitioners' motion for temporary injunction with regard to § 111.36(B)(2)(b) (the requirement of the disclosure of principal owners) and § 111.35(D) (the "no touch" provision); and granting Metro's motion for summary judgment as to all issues except for those

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[1] Of course, state constitutional protections can afford greater protections than their federal counterparts, and Petitioners sought to invoke such protections below by additionally referencing and arguing for such additional protections under the Kentucky Constitution. *See, e.g.* App. 380-81 But the federal questions, such as those involving the First Amendment's protections, always provided a minimum guarantee of protections and, as is evident from the references herein, Petitioners invoked these federal issues throughout the proceedings below.

two sections. App. 140-65. The circuit court addressed both the state and federal issues raised by Petitioners by analyzing and applying the proper federal doctrines for such constitutional review. *See, e.g.*, App. 144 ("the standard of review required to determine the state and federal constitutionality of the Ordinance, given its underlying stated justification to decrease secondary effects and not speech, is the test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)"); App. 151 ("federal courts apply the *O'Brien* test to determine a disclosure provision's constitutionality"); App. 158-59, 161-62 (applying federal case law and analysis to Petitioners' challenges regarding secondary effects and time, place, and manner restrictions). The circuit court granted virtually complete summary judgment to Respondent Metro: 1) without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

Petitioners all timely filed Notices of Appeal in the Kentucky Court of Appeals, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). Upon application, the Court of Appeals issued a stay pending appeal. Petitioners again raised the federal questions sought for review here. *See, e.g.*, App. 274-76, 292-300, 321-26 (analyzing prior restraints, secondary effects doctrine, time, place, and manner restrictions, and general free

speech principles under minimum federal constitutional principles, but arguing for even greater protection under Kentucky constitutional interpretation).

On October 5, 2007, the Kentucky Court of Appeals issued an Opinion Affirming in Part and Reversing in Part. App. 40-139. Applying a *de novo* standard of review, the Court of Appeals essentially ruled in favor of Metro on every possible issue. The Court of Appeals affirmed the circuit court's judgment on all issues raised by Petitioners and reversed the circuit court on both issues raised by Metro in their cross-appeal, finding all challenged provisions of the Ordinance, including both the disclosure of shareholders provision (§ 111.36(B)(2)(b)) and the "no-touching" provision (§ 111.35(D)), to be constitutionally sound. App. 40-139. Although again largely analyzing Kentucky constitutional matters, the Court of Appeals nonetheless analyzed Petitioners' claims under federal case law, noting that the United States Constitution and the federal cases interpreting it provide a floor of constitutional protections that must be met. *See generally* App. 62-103, 120-38 (relying, almost exclusively, on federal constitutional principles and applying federal case law to all of the claims presented here); *see also* App. 64-65 (specifically noting that "Kentucky courts, in other cases, have specifically held that the freedom of speech provisions in the Kentucky Constitution are similar to that of the United States Constitution," holding that "free speech and free expression protections under the Kentucky Constitution are consistent with those in the United States Constitution," and thereby rejecting Petitioners' arguments relying on "a higher level of protection

under the Kentucky Constitution beyond that granted by the First Amendment.").

Petitioners then sought discretionary review in the Kentucky Supreme Court, again preserving the federal issues which are the subject of this Petition. *See, e.g.*, App. 338, 346 (raising issues of whether protections on expression and other liberties in Kentucky Constitution are more stringent or only equal to the minimum protections guaranteed by the federal constitution and the case law interpreting the First Amendment). On April 16, 2008, the Kentucky Supreme Court granted discretionary review. App. 349-50. In this Order, the court specifically invited the Petitioners to brief the Twenty-First Amendment issues raised by the prohibition on alcohol, but noted that the parties were free to include all preserved issues in their briefs. *Id.* In their Brief to the Kentucky Supreme Court, Petitioners did address the Twenty-First Amendment issues as requested, as well as all of the other issues previously preserved, again raising and arguing the federal issues presented in this Petition. *See, e.g.*, App. 380, 389-91, 395-98, 403-10, 411-16, 422-28, 435-40, 442-46 (analyzing prior restraint, secondary effects doctrine, time, place, and manner restrictions, alcohol regulation, and general free speech principles under minimum federal constitutional principles, but at times arguing for even greater protection under Kentucky constitutional interpretation); *see also* App. 380 (noting that although Petitioners claims were predicated upon Kentucky Constitution, the analysis is one of federal law because "state rights cannot fall below the minimum guarantees of rights under the United States Constitution.").

On April 22, 2010, the Kentucky Supreme Court issued an Opinion affirming in part, reversing in part, and remanding. App. 1-39. The court determined that all of the restrictions in Chapter 111 were constitutional except for the blanket "no touch" provision, which the court determined was unconstitutionally overbroad in that it forbade lawful, nonsexual, consensual touching. App. 3, 12. Petitioners sought a rehearing before the Kentucky Supreme Court on May 11, 2010, but the Court denied the Petition on August 26, 2010. App. 166-67. In its published Opinion, the Kentucky Supreme Court, like those before it, analyzed Petitioners' claims under federal law, even those claims that were brought under state constitutional law. *See, e.g.*, App. 5 (noting that "[w]hile state courts are free to expand individual rights beyond the federal floor ... we adjudge that on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution."); App. 5-20 (analyzing claims presented here under federal standards and applying federal case law). However, as will be argued below, while the Kentucky Supreme Court ostensibly considered and applied the applicable federal law on these matters, its Opinion failed to properly take into account controlling case law of this Court (including, significantly, Justice Kennedy's concurring opinion in *Alameda Books*) and, as such, that Opinion conflicted with much federal case law in these areas.

Accordingly, Petitioners now seek a Writ of Certiorari to resolve these conflicts and bring clarity to this body of law.

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY SUPREME COURT'S INTERPRETATION OF FEDERAL SECONDARY EFFECTS ANALYSIS MISCONSTRUES THIS COURT'S CONTROLLING PRECEDENT AND IS IN CONFLICT WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SEVERAL OTHER COURTS, AND, AS SUCH, THIS COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THE CONFLICT AND BRING CLARITY TO THIS CONTENTIOUS, CONFUSING, AND OFT-RECURRING AREA OF CONSTITUTIONAL LAW.

This Court should grant the instant Petition for Writ of Certiorari because the Kentucky Supreme Court Opinion below misconceived and misapplied the secondary effects doctrine, misconstrued the binding precedent of this Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit and several other courts.

As noted above, the Kentucky Supreme Court, and the lower state courts before it, applied federal precedent and federal case law to Petitioners' claims, even those that were brought under Kentucky state constitutional provisions. This is because, while a state is free to give greater protections under its state constitution, the Supremacy Clause mandates that state constitutional protections cannot fall below the

federal floor, meaning the minimum guarantees of individual rights under corollary provisions of the United States Constitution; and because the Kentucky Supreme Court has determined that "on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution." App. 5; *see also, e.g., Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 418 (Ky. 2005). As such, the Kentucky Supreme Court's application of federal law was, at least in the abstract, appropriate.

While the Kentucky Supreme Court's decision to analyze Petitioners' claims under federal law was correct, its application of that law under this Court's controlling precedent was improper. Federal interpretation of the First Amendment in the realm of sexually oriented businesses and sexual expression has evolved over the years. In 1986, the United States Supreme Court issued its opinion in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which declared – for the first time in a majority opinion – that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments, and that under such circumstances the constitutionality of those types of laws could be evaluated under intermediate, as opposed to strict, scrutiny. *Id.* at 47. Since that time, attempts by the Supreme Court to further define and refine its "secondary effects doctrine" have resulted in the issuance of a number of plurality decisions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*"); and *Alameda Books*, 535 U.S. 425. *Barnes* and *Pap's II* dealt with the question of whether "across-the-board" prohibitions of "public nudity" could

constitutionally be applied to prohibit nude performance dance entertainment, and both *Pap's II* and *Alameda Books* revisited *Renton* and considered the evidentiary standards to be used when applying the secondary effects doctrine.

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate scrutiny test for "symbolic speech" (*i.e.*, expressive *conduct*) as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court held that in order to pass muster under the First Amendment, determinations would have to be made as to: 1) whether the regulation at issue is within the government's constitutional power; 2) whether the regulation furthers an important or substantial governmental interest; 3) whether the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *See id.* at 377. And the plurality opinion in *Alameda Books* authored by Justice O'Connor held that in the particular circumstances at issue there, the City of Los Angeles had presented sufficient evidence of a "secondary effects" justification for enacting a zoning ordinance that prohibited "multiple use" adult businesses in order to survive a motion for summary judgment. The case was remanded for a full trial on the merits. 535 U.S. at 443.

Then there is the issue of what level of scrutiny – "strict" or "intermediate" – is to be applied in evaluating the constitutionality of laws which are

enacted to regulate sexual expression.[2] The choice of the level of scrutiny to be applied often, of course, determines the outcome of the constitutional question. *Byram v. United States*, 705 F.2d 1418, 1421 (5th Cir. 1983). As a matter of general federal constitutional principle, it is said that a law which is directed at the *content* of expression is subject to strict scrutiny, while a "content neutral" one is to be evaluated under the lesser demands of intermediate scrutiny. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). Yet, *Renton* created what lower courts have referred to as a "legal fiction" (*see, e.g., Richland Bookmart, Inc., v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998)), by ruling that at least in the area of sexual expression, a law which is "*justified*" upon a concern of "secondary effects," even though it may regulate based upon the *content* of the expression, may be *treated* as if it was a content neutral regulation and thus be subject to only intermediate scrutiny. *See Renton*, 475 U.S. at 47-48.

This "legal fiction" crumbled to a certain extent, however, in *Alameda Books*. There, a majority of five Justices – in two separate opinions – concluded that it was inappropriate to continue to refer to these types of laws, which clearly delineate their restrictions predicated upon the *content* of the expression at issue,

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[2] Unlike the standards in *O'Brien*, discussed *supra*, strict scrutiny requires that a law be *necessary* to further a *compelling* state interest, and must be *narrowly drawn* to achieve that end. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Under strict scrutiny, narrow tailoring requires that the government choose the "*least restrictive means* to further the articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (emphasis added).

as being "content neutral." *See Alameda Books*, 535 U.S. 425, 457, 464 n.8 (Souter, J., dissenting on behalf of three and four Justices respectively); *id.* at 448 (Kennedy, J., concurring in the judgment) (noting that "[t]hese ordinances are content based and we should call them so"). *See also, e.g. 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 n.2 (6th Cir. 2008).

Justice Kennedy authored a concurring opinion in *Alameda Books* devoted almost exclusively to the standards which are to be applied pursuant to the "narrow tailoring" component of the intermediate scrutiny test (*i.e.*, the fourth prong of *O'Brien*), and in the process developed what has come to be known as the "proportionality test." Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they *cannot* have the consequent effect of also reducing speech or expression related activities:

> In *Renton*, the Court determined that while the material inside adult bookstores and movie theaters is *speech*, the consequent sordidness *outside* is *not*. The challenge is to correct the latter while leaving the former, *as far as possible, untouched*. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, *and at the same time leave the quantity and accessibility of the speech substantially undiminished,* there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside – that is, even if the measure is in that sense content-based. On the other

> hand, *a city may not regulate the secondary effects of speech by suppressing the speech itself.*

Alameda Books, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). Specifically, he observed that a regulation can be consistent with the First Amendment "if it is *likely* to cause a *significant decrease* in secondary effects and a *trivial decrease* in the quantity of speech," *id.* at 445 (Kennedy, J., concurring) (emphasis added), and summarized his analysis as follows:

> *A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with* [the four Justice dissent authored by] Justice SOUTER.... The rationale of the ordinance must be that it will suppress secondary effects – *and not by suppressing speech*.

Id. at 449-50 (Kennedy, J., concurring) (emphasis and clarification added; citation omitted). Perhaps even more importantly, and certainly more relevant to the specific issues under consideration here, Justice Kennedy further explained that a constitutional analysis directed at these type of regulations must "address *how speech will fare* under the city's ordinance." *Id.* at 450 (emphasis added). These, therefore, are the general standards pursuant to which the Ordinance should have been evaluated in order to determine whether it passes muster under a federal Constitutional analysis.[3]

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[3] In order to determine the binding authority of a plurality Supreme Court decision, courts must apply the test announced in

Marks v. United States, 430 U.S. 188 (1977), which states that "[w]hen a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (*citing Gregg v. Georgia*, 428 U.S. 153, 160 n.15 (1976)). Under a *Marks* analysis, all federal courts that have examined this issue, save one, have concluded that Justice Kennedy's concurring opinion represents the constitutional holding of the Court in *Alameda Books*, regardless of the type of legislation at issue. *See, e.g., 729, Inc.*, 515 F.3d at 491 (regulations of "adult" businesses must leave the "quantity and accessibility of speech substantially intact" and may not substantially reduce speech, and acknowledged that "Justice Kennedy's opinion binds us on this point."); *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (applying Justice Kennedy's concurring opinion to both zoning and public nudity ordinances); *id.* at 1264 ("Because he concurred in the judgment of the Court on the narrowest grounds, Judge Kennedy's concurrence represents the Court's holding in *Alameda Books* under *Marks*"); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003) (Justice Kennedy's concurrence applying to an alcohol prohibition in places where nude dancing occurs, and to a dancer/patron "buffer zone"); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009) (challenging an adult entertainment establishment licensing and regulatory ordinance); *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 561 (7th Cir. 2009) (challenging locational restrictions on sexually oriented businesses); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir. 2003) (challenging ordinance prohibiting the sale, use or consumption of alcohol on the premises of "Sexually Oriented Businesses"); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (challenging a public indecency ordinance). Only one federal circuit has strayed from this consensus. *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1163-64 (9th Cir. 2003) (concluding, 2 to 1, that Justice Kennedy's proportionality test was only applicable in a zoning context, and was not relevant to whether an Arizona hours-of-operation statute passed constitutional muster under intermediate scrutiny). However, in

Yet, the Kentucky Supreme Court did not even attempt to analyze Chapter 111 using Justice Kennedy's "proportionality" test, which, as noted, requires a court to address "how speech will fare" under the restrictions of the challenged ordinance. *Alameda Books*, 535 U.S. at 445-450 (Kennedy, J., concurring). Instead, the court below simply noted that "many of the issues in this case are controlled by *Jameson*, and *Restaurant Ventures LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001), two cases reviewing the constitutionality of local government ordinances regulating sexually oriented adult entertainment businesses." App. 5, 7-8. However, the two Kentucky cases upon which the Kentucky Supreme Court relied in analyzing regulations on adult entertainment businesses did not address Justice Kennedy's proportionality test. In fact, *Restaurant Ventures*, 60 S.W.3d 572, was decided over a year before the Supreme Court issued its opinion in *Alameda Books*. And, although the court in *Commonwealth v. Jameson* ostensibly considered and applied the *Alameda Books* decision in its analysis, *see* 215 S.W.3d 9, 26-27 (Ky. 2006), that court did not undertake an analysis under the proportionality test that is required by Justice Kennedy's concurrence, which was the constitutional holding of *Alameda*.

Thus, nowhere in the Opinion sought to be reviewed here, nor in any of the case law which that court referenced as ostensibly justifying and controlling the Ordinance under consideration *sub*

Arizona v. Stummer, 194 P.3d 1043 (Az. 2008), the Arizona Supreme Court subsequently rejected and criticized the divided-panel decision in *Maricopa County*.

judice, did the Kentucky Supreme Court actually consider whether Metro's interest in reducing secondary effects via Chapter 111 would have the unconstitutional effect of reducing speech in the same proportion. Simply put, the Kentucky Supreme Court failed to undertake the proportionality review mandated by this Court's jurisprudence as set forth in Justice Kennedy's concurring opinion in *Alameda Books*. Because the Opinion of this state court of last resort is in conflict with the relevant decision of this Court, it is respectfully submitted that this Court should grant certiorari in order to clarify and ultimately rectify this impropriety.

In addition to not following this Court's controlling precedent, the Kentucky Supreme Court's application of the secondary effects doctrine was in conflict with that of two recent decisions from the United States Court of Appeals for the Seventh Circuit, *Annex Books*, 581 F.3d 460, and *New Albany DVD*, 581 F.3d 556. Both of these cases are pertinent and significant in that they reaffirm that Petitioners here should have been entitled to litigate their "as applied" challenge to the "secondary effects" justification of Chapter 111. And both of these decisions acknowledged that Justice Kennedy's concurring opinion constituted the holding of the plurality decision of *Alameda Books*, 535 U.S. 425, which holds that secondary effects may not be reduced by curtailing the speech itself. *New Albany DVD*, 581 F.3d at 561; *Annex Books*, 581 F.3d at 465. In the case *sub judice*, by contrast, the Kentucky Supreme Court did not permit Petitioners to litigate their as applied challenge to Metro's secondary effects justification for enacting Chapter 111.

The ordinance at issue in *Annex Books* restricted the hours of operation of adult businesses similar to the provision contained in § 111.18 (although the constitutional analysis employed by the Seventh Circuit is equally applicable to basically all of the Appellants' challenges in this matter). The Seventh Circuit held that:

> None of the studies on which the City relied before enacting the law, and none introduced in this record, concerns that kind of ordinance. Nor do the studies show that an increase in adult businesses' operating hours is associated with more crime; the studies are simply cross-sectional analyses that leave causation up in the air. (In other words, they may show no more than that adult businesses prefer high-crime districts where rents are lower.)

Annex Books, 581 F.3d at 462-63. The Court further found fault with the generic studies presented by the City of Indianapolis, stating that the City "has approached this case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city"; and noted that "there must be *evidence*; lawyers' talk is insufficient." *Id.* at 463 (emphasis in original); *see also, e.g., Abilene Retail #30, Inc. v. Dickinson County*, 492 F.3d 1164 (10th Cir. 2007) (precluding government from relying on studies from urban environment to justify its regulation of single adult bookstore located off highway pullout because such a standard "would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented

business, of any type, located in any setting" and thus concluding that a material dispute of fact existed sufficient to overcome summary judgment).

The Seventh Circuit in *Annex Books* held that the evidence presented by the plaintiffs' expert and the deficiencies in the studies relied upon by the City "call the City's justifications into question and *require an evidentiary hearing* at which the City must support its ordinance under the intermediate standard of *Alameda Books*." 581 F.3d at 465 (emphasis added). The Court in *Annex Books* points to Justice Kennedy's concurrence in *Alameda Books*, for guidance and recognizes that:

> Justice Kennedy insisted that the benefits (less crime) be compared with the detriments (less speech) and added that a given regulatory system is easier to justify if it works in the same way as the regulation of other, similar, businesses, for then it is harder to conclude that the government has set out to curtail speech because of its subject matter.

Id. This decision makes perfectly clear that Petitioners were entitled to challenge the secondary effects justifications of ordinances regulating adult entertainment businesses, and that the municipalities must set forth actual evidence supporting those justifications, and not simply rely on prepackaged studies and "lawyers' talk." The Kentucky Supreme Court did not permit Petitioners to make such an as applied challenge in the present case.

In *New Albany DVD*, the Seventh Circuit reiterated the burden a municipality must bear in justifying its

regulation of constitutionally protected expression. Relying on the edict in *Alameda Books* that the "municipality's evidence must fairly support the municipality's rationale for its ordinance," and finding that no such evidence was presented in the case before it, the *New Albany DVD* Court noted that:

> New Albany has not supplied evidence that "fairly supports" the idea that adult bookstores located near churches or residences attract thieves who then steal from the local denizens as well as the stores' customers. We don't say that the City will be unable to produce this evidence, *but the lack of good evidence to this effect* in the record – coupled with evidence implying that take-home adult stores do not have adverse secondary effects – *is strong enough to require an evidentiary hearing*. Our opinion in *Annex Books* expands on this reasoning, which need not be repeated here.

New Albany DVD, 581 F.3d at 560 (emphasis added). In addition to the claim that adult businesses engender adverse secondary effects in the form of more thefts, the City there argued that such businesses created pornographic litter. The Seventh Circuit found that the City should have presented evidence that such litter is a serious problem in around adult businesses, *id.* at 560-561, and suggested that the City's restrictions on adult businesses may violate Justice Kennedy's holding in *Alameda Books*:

> [T]he reduction in adverse secondary effects may not be achieved just by curtailing speech. "A city may not assert that it will reduce secondary effects by reducing speech in the

> same proportion." 535 U.S. at 449. New Albany's "litter" justification comes perilously close to this, because the amount of pornographic litter may depend linearly on the volume of adult materials sold. The only way to cut litter by 10% may be to reduce sales by 10%, and such a justification would fail under Justice Kennedy's approach.

Id. at 561.

In contrast to the Seventh Circuit's application of the secondary effects jurisprudence, the Court below did not even permit the Petitioners to meaningfully challenge Metro's justification for its Ordinance, nor take into account Justice Kennedy's "proportionality" test. Instead, the Kentucky Supreme Court simply relied upon previous Kentucky cases that had addressed and upheld similar regulations in order to dismiss Petitioners' claims out of hand. App. 7-8 (noting that the anti-nudity, buffer zone, stage height, and limited hours of operations restrictions in Chapter 111 were similar to those previously upheld in *Jameson* and/or *Restaurant Ventures*, and thus disposing of these claims summarily without permitting Petitioners to challenge or litigate Metro's justifications *in this case*). Indeed, in referencing the previous *Jameson* decision, the Kentucky Supreme Court below stated "[w]e have nothing to add to this analysis and are not inclined to depart from any of the reasoning or conclusions reached" therein. App. 5. In contrast, the Seventh Circuit in *New Albany DVD* summed up its opinion by ordering that the "district court needs to take evidence and apply intermediate scrutiny to New Albany's ordinance." 581 F.3d at 561. The lower courts here likewise were required to receive

evidence and to permit Petitioners to challenge Metro's secondary effects justification for enacting Chapter 111. Regardless of the Kentucky Supreme Court's belief of Petitioners' entitlement to take discovery regarding the secondary effects doctrine, Petitioners should have been afforded the opportunity to actually *litigate* this issue at trial.

Because the state court of last resort below opined that it did not even have to provide Petitioners with such an opportunity, the Opinion of the Kentucky Supreme Court is in conflict with the decisions of the Seventh Circuit regarding this matter. As such, Petitioners submit that this Court should accept review of their Writ of Certiorari and resolve this conflict.

II. THE KENTUCKY SUPREME COURT'S DETERMINATION THAT THE ALCOHOL RESTRICTIONS IN CHAPTER 111 ARE CONSTITUTIONAL CONFLICTS WITH THE RELEVANT DECISION OF THIS COURT IN *44 LIQUORMART, INC. V. RHODE ISLAND.*

Petitioners submit that the Kentucky Supreme Court failed to properly consider and apply this Court's decision in *44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484 (1986), a decision that would have and should have mandated a different outcome in the case *sub judice*. The court below ruled that Chapter 111 does not violate the Twenty-first Amendment by relying on a prior line of cases from this Court, including *City of Newport v. Iacobucci*, 479 U.S. 92 (1986), and *New York State Liquor Comm. v. Bellanca*, 452 U.S. 714 (1981). App. 16-17. These cases previously held that the Twenty-first Amendment

conferred an "added presumption" of validity in favor of alcohol prohibitions and that these types of restrictions trumped competing constitutional considerations, including conduct and expression otherwise protected by the First Amendment. *See, e.g.*, *Iacobucci*, 479 U.S. at 95; *Bellanca*, 452 U.S. at 718. Contrary to these holdings, however, *44 Liquormart*—which was decided *subsequent* to both *Iacoucci* and *Bellanca*—makes clear that the Twenty-first Amendment cannot be used to save an otherwise invalid government restriction. *44 Liquormart*, 517 U.S. at 516 (the Twenty-first Amendment "does not license the States to ignore their obligations under other provisions of the Constitution ... [nor] in any way diminish the force of the Supremacy Clause.... We see no reason why the First Amendment should not also be included in that list.") (citations omitted); *see also id.* at 532-34 (O'Connor, J., concurring in judgment).

Thus, even assuming *arguendo* that Kentucky theoretically delegated to Metro the authority to prohibit alcohol sales in the manner proscribed by the Ordinance, the Ordinance is still not valid as a lawful exercise of police power under the Twenty-first Amendment because under *44 Liquormart*, such a prohibition no longer trumps competing constitutional interests, including Petitioners' straightforward Supremacy Clause argument that § 111.30 of Metro's ordinance is invalid because it violates Petitioners' First Amendment rights, conflicts with § 61 of the Kentucky Constitution, and was not a proper exercise of the state's police powers. In sum, the Kentucky Supreme Court's Opinion suggesting that the Twenty-First Amendment confers an added presumption of validity in favor of alcohol regulations, which thereby trumps Petitioners' interests despite the otherwise

invalid restrictions on Petitioners' First Amendment protections, is in conflict with relevant decisions of this Court in *44 Liquormart*, 517 U.S. 484. To remedy this conflict, certiorari should be granted.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Honorable Court grant the instant Petition for a Writ of Certiorari.

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Dated: January 21, 2011

APPENDIX
TABLE OF CONTENTS

VOLUME 1

Appendix A: Opinion of the Court by Justice Schroder Affirming in Part, Reversing in Part and Remanding, Supreme Court of Kentucky, (April 22, 2010) 1a

Appendix B: Opinion Affirming in Part and Reversing in Part, Commonwealth of Kentucky, Court of Appeals, (October, 5, 2010) 40a

Appendix C: Opinion and Order, Jefferson Circuit Court, Division Six, (December 14, 2004) 140a

Appendix D: Order Denying Petition for Rehearing, Supreme Court of Kentucky, (August 26, 2010) 166a

Appendix E: Louisville/Jefferson County Metro Government, Metro Code, Chapter 111 . . . . . 168a

Appendix F: United States Constitution
Amendment I 212a
Amendment XIV 212a
Amendment XXI 214a

VOLUME 2

Appendix G: Intervening Plaintiffs' Verified Complaint for Declaratory Relief, Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Attorney Fees, Jefferson Circuit Court,
(December 3, 2003) 215a

Appendix H: Brief of Appellants/Cross-Appellees, Commonwealth of Kentucky, Court of Appeals,
(March 3, 2006) 241a

Appendix I: Motion for Discretionary Review, Commonwealth of Kentucky, Supreme Court,
(November 2, 2007) 330a

Appendix J: Order Granting Discretionary Review, Supreme Court of Kentucky,
(April 16, 2008) 349a

Appendix K: Brief of Movants-Appellants, Commonwealth of Kentucky, Supreme Court, (June 24, 2008) 351a

APPENDIX A

RENDERED : APRIL 22, 2010
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2007-SC-000812-DG

[Filed April 22, 2010]

BLUE MOVIES, INC.,	)
D/B/A LOVE BOUTIQUE;	)
BERRY BOULEVARD ENTERTAINMENT,	)
INC., D/B/A THE ADULT TOY STORE;	)
AMERICAN PRIDE VI, INC.,	)
D/B/A LION'S DEN ADULT SUPERSTORE;	)
TAYLOR BOULEVARD THEATRE, INC.,	)
D/B/A EROTIC TOUCH;	)
TBC, INC., D/B/A METRO STATION;	)
DANNY'S INC., D/B/A THOROBRED II;	)
ENTERTAINMENT ENTERPRISES, INC.,	)
D/B/A THE GODFATHER;	)
GOLD COAST, INC., D/B/A THOROBRED III;	)
HAYES ENTERTAINMENT, INC.,	)
D/B/A THOROBRED IV;	)
LLL, INC., D/B/A GREENLIGHT LOUNGE;	)
PHAT'S BAR & GRILL, INC.,	)
D/B/A PHAT'S BAR & GRILL;	)
RIVERVIEW ENTERTAINMENT, INC.,	)
D/B/A THOROBRED VI; SOUTH DIXIE	)
ENTERTAINMENT, INC.,	)
D/B/A THOROBRED VII;	)

KENTUCKY RESTAURANT CONCEPTS, INC.,)
D/B/A PT'S SHOWCLUB;)
TAYLOR BOULEVARD THEATRE, INC.,)
D/B/A DÉJÀ VU; TEDDY'S INC.,)
D/B/A THOROBRED V; THOROBRED INC.,)
D/B/A THOROBRED LOUNGE; FOXY LADY,)
INC., D/B/A FOXY LADY GENTLEMEN'S)
CLUB; TINSLEY'S CENTRAL BAR, INC.,)
D/B/A BEAR NECESSITIES, INC.;)
WIN PLACE AND SHOW BAR, INC.,)
D/B/A WIN, PLACE & SHOW BAR)
)
APPELLANTS)
)
V.)
)
LOUISVILLE/JEFFERSON COUNTY)
METRO GOVERNMENT)
)
APPELLEE)
_____)

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2005-CA-000085-MR
CASE NO. 2005-CA-000090-MR
CASE NO. 2005-CA-000091-MR
CASE NO. 2005-CA-000092-MR
CASE NO. 2005-CA-000100-MR
CASE NO. 2005-CA-000113-MR
CASE NO. 2005-CA-000176-MR
JEFFERSON CIRCUIT COURT NO. 04-CI-01967

OPINION OF THE COURT
BY JUSTICE SCHRODER
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This Court granted discretionary review of a Court of Appeals opinion adjudging that the Louisville/Jefferson County Metro Government's 2004 amendments to its code of ordinances, which placed numerous restrictions on adult entertainment businesses in the Metro area, were constitutional. Having considered the record and arguments of counsel, we adjudge that all of the restrictions, except for the blanket "no touch" provision, are constitutional. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

Appellants represent two types of adult entertainment businesses which operate in the Louisville Metro area: live entertainment establishments that sell alcohol (with the exception of one business); and retail businesses that do not sell alcohol. On March 1, 2004, Appellee, the Louisville/Jefferson County Metro Government ("Metro"), enacted Ordinance 21, Series 2004, which amended Chapter 111 of its Code of Ordinances. The amendments pertained to adult entertainment businesses in the Louisville Metro area, and the stated purpose of the amendments was to combat the adverse secondary effects of sexually oriented adult entertainment businesses. Appellants objected to the following provisions in the amendments: the licensing scheme (owner/officer disclosure, licensing fees,

criminal disability provision); the anti-nudity provisions; restrictions on the hours of operation; no direct tipping provision; prohibition on sales of alcohol; buffer zones between patrons and dancers; and a "no touch" provision.

Appellants filed suit in Jefferson Circuit Court on March 5, 2004, challenging the amendments to Chapter 111 on numerous state constitutional grounds. Thereafter, Metro removed the case to federal court and Appellants filed a motion to remand. The federal court granted Appellants' motion, deciding that it lacked jurisdiction under 28 U.S.C. § 1441 because Appellants did not make any claims under the federal Constitution.

The Jefferson Circuit Court granted summary judgment for Metro as to all the challenged provisions in the amendments except the requirement of disclosure of principal owners and the "no touch" provision, granting Appellants' motion for temporary injunction only as to enforcement of those two provisions. An appeal and a cross-appeal to the Court of Appeals followed.

On October 5, 2007, the Court of Appeals rendered its opinion wherein it upheld all of the challenged provisions, affirming the circuit court as to all the rulings adverse to Appellants and reversing on cross-appeal as to the two provisions construed in Appellants' favor. The case is now before us on Appellants' motion for discretionary review.

Because this case involves the construction and constitutionality of the ordinance at issue, our review of the case will be de novo. *Commonwealth v. Jameson*,

215 S.W.3d 9, 15 (Ky. 2006), *cert. denied*, 552 U.S. 825 (2007). At the outset, we note that many of the issues in this case are controlled by *Jameson*, and *Restaurant Ventures LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001), two cases reviewing the constitutionality of local government ordinances regulating sexually oriented adult entertainment businesses.

In *Jameson*, this Court provided a thorough analysis of the United Sates Supreme Court decisions in the area of regulating nude dancing and sexually oriented businesses, some of which were plurality opinions, up through the Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). We have nothing to add to this analysis and are not inclined to depart from any of the reasoning or conclusions reached in *Jameson*. While state courts are free to expand individual rights beyond the federal floor, *see Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), we adjudge that on the issue of regulating sexually oriented businesses, the Kentucky Constitution does not grant broader protections than the federal Constitution, except for the blanket ban on touching as discussed below. Thus, we reject Appellants' urging that we adopt the Pennsylvania courts' expansive view on erotic expression in interpreting § 1 and § 8 of the Kentucky Constitution.

The amendments to Metro's ordinance herein implicate at least two protected categories of speech. First, there is the sexually explicit, but not obscene, speech associated with the retail businesses, such as adult books and videos. Secondly, there is the "symbolic speech" associated with the nude or semi-nude dancing at the live entertainment

establishments. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (wherein a plurality held that nude dancing was "expressive conduct within the outer perimeters of the First Amendment"). "[R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). However, "content-neutral" time, place, and manner regulations which restrain speech will be upheld as constitutional if they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Id.* at 47. If the regulations are content-based, they are subject to strict scrutiny. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). If the regulations governing a sexually oriented business are unrelated to the suppression of expression, they are content-neutral and thus subject to the intermediate standard of scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court articulated the following four-part test for evaluating regulations affecting sexually oriented businesses:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

In *Jameson*, this Court found that the restrictions (no nudity, no physical contact, and limited hours) on sexually oriented businesses were content-neutral because they were enacted to prevent the negative secondary effects of such businesses - increased crime, lowered property values, and sexually transmitted diseases. 215 S.W.3d at 28. In the present case, Metro enacted the amendments to the ordinance regulating sexually oriented businesses to combat the following secondary effects: adverse effects on nearby parks, houses, and schools; urban blight; crime (including organized crime); prostitution; spread of sexually transmitted diseases; unsanitary conditions; public indecency; lewdness; loitering; illicit drug use and trafficking; negative impacts on property values; pornographic litter; sexual assault and exploitation; public indecency; obscenity; and noise. In addition, Metro cited to numerous reports and judicial opinions that have recognized or documented the adverse secondary effects of sexually oriented businesses.

PROVISIONS GOVERNED BY *JAMESON* OR *RESTAURANT VENTURES*

The anti-nudity, six-foot buffer zone, 18-inch stage height, and limited hours of operation provisions in the ordinance are all provisions that were addressed and upheld in *Jameson* and/or *Restaurant Ventures*. The buffer zone and stage height provisions are identical to those in *Restaurant Ventures*, and the restrictions on hours of operation in Metro's ordinance (cannot operate from 1:00 am – 9:00 am) are more generous than those upheld in *Restaurant Ventures* (cannot be open from 1:00 a.m. – 3:00 p.m.). 60 S.W.3d at 579-80. We decline to afford these restrictions any greater

protection under the Kentucky Constitution than in *Jameson* and *Restaurant Ventures*.

"NO TOUCH" PROVISION

Metro's "no touch" restriction provides: "It shall be a violation of this chapter for any employee, who regularly appears semi-nude in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer." The trial court found that the restriction was unconstitutionally overbroad because it could be read to prohibit touching between an employee and a customer off the premises of the adult entertainment business and "otherwise legal and expressive touching such as handshake between a patron and a dancer who is fully clothed and not performing at the time." The Court of Appeals upheld the restriction, rejecting the trial court's conclusion that the restriction could be read to apply to contact off the premises of the adult entertainment business. As for prohibiting otherwise legal and expressive touching in the establishment, the Court of Appeals held that such a ban is not constitutionally infirm because "touching between a performer and a customer is not protected expression." *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253-55 (5th Cir. 1995).

In *Jameson* and *Restaurant Ventures*, provisions prohibiting physical a contact between adult entertainment employees and customers were upheld. However, the language in the "no touch" provisions in those cases was limited to when the employee was performing. *Jameson*, 215 S.W.3d at 11; *Restaurant Ventures*, 60 S.W.3d at 580. In the present case, the prohibition on touching between an employee and

patron has no such limitation. Clearly, Metro's "no touch" provision would be valid if it applied to employees only while they were performing or while still in a state of nudity. *See Hang On, Inc.*, 65 F.3d at 1251. "By placing a reasonable distance between the patrons and the performers, there is a decreased opportunity to solicit sex, contract social disease, and renders the no touch rule easier." *Restaurant Ventures*, 60 S.W.3d at 580 (addressing the buffer zone, stage requirement and no touch provisions as they relate to the distance between the patrons and performers while they are performing).

However, the question in this case is whether Metro's "no touch" provision is overbroad because it would prohibit any intentional touching between an employee and patron, even if the performer is not performing or is fully clothed, and would prohibit even lawful touching of a nonsexual nature, such as a handshake. The Court of Appeals in *Restaurant Ventures* even questioned whether non-erotic touching could be prohibited:

> Appellants' argument that otherwise legal and expressive conduct, such as shaking hands or other non-erotic touching between people, could be prohibited under the ordinance is folly. The ordinance does not prohibit such social niceties (unless done while nude). The line between prohibited conduct and permitted conduct is clearly drawn by the ordinance.

Id. at 579. As recognized by the court in *Threesome Entertainment v. Strittmather*, wherein the court struck down a "no touch" provision:

> Thus, a semi-nude dancer could not even shake hands with a patron. A semi-nude dancer also could not accept a glass of water from a co-employee if their hands touched in the exchange. And, ironically, under this Ordinance, a semi-nude dancer could not even push a customer away to rebuff an advance without subjecting herself to criminal charges.

4 F. Supp. 2d 710, 722 n.6 (N.D. Ohio 1998) (finding "no touch" provision overbroad because it did not contain a mens rea requirement). While the "no touch" provision in the present case does contain a mens rea, it would still prohibit benign, non-sexual, consensual, otherwise lawful touching between an employee and a customer, even when the employee is not performing or in a state of nudity.

We do not agree with the Court of Appeals conclusion that all touching between a performer and a customer is not constitutionally protected. As noted above, touching during an erotic performance or while in a state of nudity is not protected expression. We would also agree that sexual touching would not be protected expression. However, we believe that nonsexual, consensual touching, such as a handshake or a pat on the back, as a greeting or show of fellowship, is a social custom and an integral part of our culture. This sort of touching is not based on any right of artistic expression, but on one's right to free association. Thus, it is afforded protection under § 1 and § 2 of the Kentucky Constitution as part of an individual's right to personal liberty. As this Court recognized in *Wasson*:

> The meaning of Sections One and Two as they apply to personal liberty is found in the remarks of J. Proctor Knott of Marion County (see Official Report of the Proceedings and Debates in the 1890 Convention, E. Polk Johnson, Vol. 1, p. 718)
> "[T]hose who exercise that power in organized society with any claim of justice, derive it from the people themselves. That with the whole of such power residing in the people, the people as a body rest under the highest of all moral obligations to protect each individual in the rights of life, liberty, and the pursuit of happiness, provided that he shall in no wise injure his neighbor in so doing."

842 S.W.2d at 494-95. The *Wasson* court goes on to quote from *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383 (1909):

> Man in his natural state has the right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires . . . . It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him

> any liberty the exercise of which will not directly injure society.

Wasson, 842 S.W.2d at 494-95 (quoting *Campbell*, 117 S.W. at 385).

We recognize that our nation's highest Court has rejected the notion of any right of "free association," unless it is the context of free speech or an intimate human relationship. *See City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Nevertheless, we deem such a right exists in the Commonwealth under our state Constitution. However, we acknowledge this right is not absolute. Hence, we must apply the test of *O'Brien* to assess whether Metro's blanket "no touch" provision is sufficiently justified to combat the secondary effects of sexually oriented businesses.

There is no question that the first three parts of the *O'Brien* test have been met. As with the other restrictions we have upheld herein, Metro had the authority to enact the ordinance, there existed a substantial governmental interest in regulating sexually oriented businesses, and the provision was aimed at curbing the secondary effects of sexually oriented businesses, not the suppression of speech.

As for the fourth part of the test – whether the "no touch" provision would incidentally burden the protected conduct more than is necessary to further the governmental interest – we believe that the wording of the provision goes overboard in forbidding lawful, nonsexual, consensual touching. In regulating speech, an ordinance

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 (6th Cir. 1997) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989)) (internal citations and quotation omitted). Metro maintains that the "no touch" provision is necessary to combat prostitution and sexually transmitted disease. Although Metro has a valid interest in trying to stifle these negative secondary effects, we believe that prohibiting all touching, including benign, nonsexual touching, is substantially broader than necessary to achieve Metro's interest. The nonsexual touching that is common in our culture as a means of social greeting or as an expression of platonic affection does not always

lead to sexual behavior, and we will not cynically presume otherwise. An ordinance could easily be more narrowly tailored to prohibit sexual touching, as in the ban on touching during a performance or while in a state of nudity. Further, there exist laws in the Commonwealth which criminalize unwanted sexual contact. *See* KRS 510.130. Accordingly, we adjudge that the "no touch" provision in this case is unconstitutionally overbroad.

DIRECT TIPPING PROVISION

Appellants also take issue with the following provision in the ordinance which prohibits directly tipping the entertainers:

> It shall be a violation of this chapter for any employee, while semi-nude in an adult business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to any employee, while said employee is semi nude in an adult entertainment establishment.

The no-direct-tipping provision is intended to work in conjunction with the staging requirement and proximity limit to reduce the secondary effects associated with the adult entertainment – prostitution, sexually transmitted diseases, and drug transactions. Indeed, it would defeat the purpose of the buffer zone or a valid "no touch" provision if patrons were allowed to directly tip performers during their performances. Thus, the provision clearly meets the first three parts of the *O'Brien* test.

Appellants argue that tips are such an important part of the adult performance, that the ban on direct tipping imposes a financial disincentive which discourages participation in the protected speech. Thus, Appellants contend that the provision is unduly burdensome.

While we recognize that money is "a necessary and integral part of many, perhaps most, forms of communication[,]" *Buckley v. Valeo*, 424 U.S. 1, 65 (1976), the restriction here does not deprive the performer of the ability to earn tips. The restriction merely disallows direct tips when the performer is in a state of semi-nudity. Tips could still be earned via a tip jar placed at the edge of the six-foot buffer zone. Further, in light of our ruling above on the "no touch" provision, tips could be given to the performer after the performance if the performer is no longer in a state of semi-nudity. Hence, the restriction allows for reasonable alternative avenues of receiving compensation for the performance, while furthering Metro's interest in reducing negative secondary effects. *See City of Renton*, 475 U.S. at 53.

PROHIBITION ON SALE OF ALCOHOL

The ordinance also contains a provision prohibiting the sale of alcoholic beverages by any adult entertainment establishment and prohibiting an adult entertainment establishment from applying for a license to sell alcoholic beverages. Appellants argue that the ban on selling alcohol is unconstitutional as a violation of § 61 of the Kentucky Constitution and the Twenty-first Amendment to the United States Constitution, and is preempted by state legislation.

The Twenty-first Amendment to the United States Constitution, which repealed prohibition, gives the states power to regulate the sale of alcohol within their borders. § 61 of the Kentucky Constitution provides for local governments to hold elections to determine if alcohol shall be sold and the sale thereof regulated within its borders. Appellants maintain that Metro's prohibition on selling alcohol violates both constitutional provisions because it was enacted without voter approval and because the state has not otherwise delegated to the local government the authority to impose alcohol prohibitions.

As for the Twenty-first Amendment claim, the United States Supreme Court could not have been more clear in *City of Newport, Ky. v. Iacobucci*, when it recognized the state's broad power to regulate alcohol, and that the state could "delegate this power as they see fit." 479 U.S. 92, 95-96 (1986). The appellee argued, as Appellants do in the present case, that, because the Kentucky Constitution allows for local elections on the issue of whether alcohol could be sold within the locale's borders, the Twenty-first Amendment is violated when a local government seeks to prohibit or regulate alcohol without such an election. Without reaching the state law question of the propriety of the delegation of authority from the state to the City of Newport, the Supreme Court adjudged that *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (holding that state could prohibit topless dancing in bars), was controlling and thus concluded that the local government's ordinance banning nude dancing in bars that sold liquor did not violate the Twenty-first Amendment. *Iacobucci*, 479 U.S. at 94-96. In *Bellanca*, the Court stated:

> This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold.

452 U.S. at 715 (citations omitted). Hence, the question of the alleged violation of the Twenty-first Amendment has been put to rest. We now turn to the claims regarding § 61 of the Kentucky Constitution and preemption.

Pursuant to § 61, the Legislature has set up means and methods of holding a local option election. KRS 242.020 et seq. KRS 241.030 and 241.060 established the Alcohol Beverage Control Board to promulgate reasonable administrative regulations governing the sale and distribution of alcohol in the state. "Under its police powers [regarding the regulation of the sale of alcohol] the Legislature may provide for supplementation of measures purely local, and grant to a local subdivision such rights as it may deem best as ways and means of exercising local police power." *Fuson v. Howard*, 305 Ky. 843, 205 S.W.2d 1018, 1020 (1947). Pursuant to this delegation of its police power, KRS 241.220 provides for the appointment of an urban-county administrator whose functions are set out in KRS 241 .250 as follows:

> The functions of each urban-county administrator shall be the same with respect to urban-county licenses and regulations as the functions of the [Alcohol Beverage Control]

> board with respect to state licenses and regulations, except that no regulation adopted by an urban-county administrator may be less stringent than the statutes relating to alcoholic beverage control or than the regulations of the board.

In *City of Louisville v. Michael A . Woods, Inc.*, the city of Louisville enacted an ordinance forbidding nude or nearly nude activities on premises licensed by the Alcoholic Beverage Control Board. 883 S.W.2d 881 (Ky. App. 1993). The opponents of the ordinance argued that the ordinance was in conflict with the statutory scheme regarding the regulation of the sale of alcohol and thus usurped the state's power to so regulate the sale of alcohol. *Id*. at 884. The Court of Appeals rejected this argument and upheld the ordinance, reasoning:

> The statutes concerning alcoholic beverages seem to not only give cities the opportunity to regulate conduct in such establishments, but require that standards be maintained. The ABC Board has acknowledged that different cities will have different standards, and the Board's regulations were to present at least some minimum standards. We find no prohibition against a city invoking stricter standards of conduct in places serving alcoholic beverages.

Id. at 883.

As the United States Supreme Court noted in *Bellanca*, "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718. And in *Ben's*

Bar, Inc. v. Village of Somerset, in rejecting a First Amendment challenge to a ban on the sale of alcohol in an adult-oriented business, the court recognized that "[p]rohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing." 316 F.3d 702, 727-28 (7th Cir. 2003).

In the instant case, the ban on the sale of alcohol in adult entertainment establishments was not more lenient than any of the statutes regulating alcohol. *See* KRS Ch. 241-244. Thus we hold that Metro's ordinance prohibiting the sale of alcohol in adult entertainment businesses was a proper exercise of its police power to regulate the sale of alcohol, as well as the conduct in adult entertainment businesses.

As to the argument that the alcohol provision was preempted by state legislation, we would note that a preemption argument was also made in *Restaurant Ventures*, regarding the restriction on the hours of operation. 60 S.W.3d at 580-81. In rejecting the assertion that the ordinance was preempted by KRS 244.295 (setting the hours of operation for alcoholic beverage licensees), this Court adjudged that "[t]he regulation of operating hours of adult entertainment establishments is a valid exercise of the government's power to regulate those establishments. The ordinance regulates the operating hours not because they sell alcoholic beverages, but because of the sexually-oriented nature of the entertainment provided." *Id.* at 581. In sum, we find there was no preemption by state legislation or violation of § 61 of the Kentucky

Constitution and uphold the ban on the sale of alcohol in the ordinance.

LICENSING PROVISIONS

1. Licensing Fees

Metro's ordinance requires adult entertainment establishments to pay $1,000 a year for a license to do business, and employees must pay $25 a year for a license to work in those establishments. Appellants argue that the cost of those licenses operates as a prior restraint on their right to operate and work in an adult entertainment establishment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000), *overruled on other grounds by 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485 (6th Cir. 2008) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

The United States Supreme Court has decided three cases that relate to charging fees to engage in protected expression: *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941); *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943); and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). Those cases essentially looked at the following three factors in determining whether a license fee is an improper restraint on free speech:

> (1) whether the fee's maximum amount will deter the exercise of First Amendment rights, (2) whether the measures the cost of which the County seeks to transfer to licensees via its fee structures are narrowly tailored means of

> advancing the County's interest in curbing secondary effects, and (3) whether the County's cost estimates for those measures are reasonable.

729, Inc., 515 F.3d at 501. The Sixth Circuit in *729, Inc.*, "distilled two general principles from *Cox, Murdock, and Forsyth County*[:]"

> First, an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses occurred [sic] in furtherance of a legitimate state interest. In other words, in order to transfer the cost of a government measure to a licensee, the measure itself must be legitimate. Thus, the measure must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. Second, [there must be] some limit on the amount the government could charge, based on the potential for a fee to deter protected speech.

515 F.3d at 502-03 (quotations and citations omitted).

Metro presented evidence of funds it would expect to spend on law enforcement, background checks, and license application processing, which would exceed projected revenue generated by the license fees. In *Bright Lights, Inc. v. City of Newport*, the court found that "because Newport's licensing fees combat undesirable effects such as prostitution, the fees

address an overriding government interest." 830 F. Supp. 378, 386 (E.D. Ky. 1993) (internal quotation and citation omitted). Likewise, the fees in the case at bar were shown to be related to legitimate costs associated with adult entertainment businesses.

As to the amount of the fees, licensing fees of $250 and $5,000 have been upheld in Kentucky for adult entertainment businesses. *Bright Lights, Inc.*, 830 F. Supp. at 386 ($5,000 licensing fee upheld); *Mr. B's Bar and Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564, 568 (Ky. App. 1981) ($250 licensing fee upheld as constitutional as a matter of law); *but cf., 729, Inc.*, 515 F.3d at 503-04 (remanding on issue of $3,000 licensing fee to determine whether amount narrowly tailored to serve a significant governmental interest). Given the evidence proferred by Metro regarding the costs of dealing with adult entertainment businesses and their secondary effects, we deem the licensing fees to be constitutionally valid.

2. Criminal Disability Provision

Another provision in the ordinance states that an adult entertainment license is to be denied if the applicant has been convicted of a specified crime, including rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and certain drug offenses. Appellants argue that the provision operates as a prior restraint on free speech and is therefore unconstitutional.

The trial court found that the Appellants lacked standing to challenge the provision because there was nothing in the record indicating that any of the them

had been convicted of any of the specified crimes. The Court of Appeals agreed, citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), which is precisely on point.

In *FW/PBS, Inc.*, which involved a similar criminal disability provision in an ordinance regulating sexually oriented businesses, there was nothing in the record indicating that any of the parties had been convicted of one of the specified crimes. *Id.* at 233-35. "To establish standing to challenge that provision the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance." *Id.* at 234. Because there is nothing in the record in the instant case demonstrating that Appellants have been convicted of any of the specified crimes, the lower court and Court of Appeals properly found they did not have standing to challenge the criminal disability provision.

3. Principal Disclosure Provision

The ordinance requires that an application for an adult entertainment license contain the name, address, date of birth, and a copy of a government issued photo identification card or a set of fingerprints of all principal owners, if the applicant is an individual. If the applicant is other than an individual, such as a corporation or partnership, each officer, director, general partner, principal owner, and each other person who will participate directly in decisions relating to the management of the business shall provide the above-listed information. A principal owner is defined in the ordinance as any person

owning, directly or beneficially, twenty percent or more of the business.

Appellants argued that the disclosure requirement for corporate shareholders owning only twenty percent of an adult-oriented business is a prior restraint on free speech, as well as a violation of their fundamental right to privacy. Although the trial court acknowledged that government has a legitimate interest in knowing the identity of those individuals who have direct legal responsibility for the operations of adult oriented businesses, the court determined that the disclosure requirement for those owning only a twenty percent interest in the business was overbroad and, thus, did not meet the fourth prong of the *O'Brien* test. The trial court reasoned that "[a] twenty percent or less shareholder would normally have little, if any, responsibility for the everyday operations of the business, and twenty percent is generally not a controlling or significant share in the business." The Court of Appeals reversed the lower court's ruling, finding that the requirement of disclosure of twenty percent shareholders furthered Metro's interest in combating organized crime associated with the adult entertainment industry, which was one of the stated purposes of the ordinance.

The United States Supreme Court has recognized that compelled disclosure, in itself, can have a chilling effect and seriously infringe on one's right to free speech guaranteed by the First Amendment. *Buckley*, 424 U.S. at 64 (1976). However, the right to anonymously exercise one's right to free speech is not absolute. A disclosure requirement will be upheld if the countervailing state interests in the information sought is shown to further a substantial government

interest. *Id.* This requires a "relevant correlation" or "substantial relation" between the information required and the government interest. *Id.* Here, Metro maintains they are entitled to disclosure of the information regarding twenty percent or more shareholders and those involved in the day-to-day operation of the business to further their interest in combating the crime, in particular organized crime, associated with adult oriented businesses.

In *Envy, Ltd. v. City of Louisville*, a similar disclosure provision was upheld in a prior ordinance enacted by the City of Louisville regulating adult entertainment establishments. 734 F. Supp. 785 (W.D. Ky. 1990). In that case, the more detailed personal information (name, address, date of birth, social security number and photograph of applicant) was required of majority shareholders and those involved in the day-to-day operations of the business, while only basic information (name and address) was required of all officers and directors. *Id.* at 787-89. The court found that evidence of the extensive involvement of organized crime in adult entertainment activities necessitated disclosure of the true owners of these establishments to aid in enforcement of criminal laws, public and safety regulations, and income tax laws. *Id.* at 790. Hence, the court held that the disclosure requirement was rationally related to and furthered the government's substantial interest in reducing the secondary effects resulting from adult entertainment businesses. *Id.*

The question before us is whether the disclosure requirement for only twenty percent shareholders is overbroad. In *Tee & Bee, Inc. v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996), a disclosure

requirement for ten percent or more shareholders in adult oriented businesses was held to be constitutional, and in *City of Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), *reversed in part on other grounds sub nom. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), a disclosure requirement for twenty percent or more shareholders was upheld. *But see East Brooks Books, Inc. v City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995) (disclosure requirement for any shareholder held to be impermissibly broad). The controlling principle in these cases appears to be "the setting of a minimum level of interest in the adult-oriented establishment in order to ensure that an individual shareholder is not subjected to regulation when he or she possesses a mere *de minimus* interest." *Tee & Bee, Inc.*, 936 F. Supp. at 1488; *see also East Brooks Books, Inc.*, 48 F.3d at 226.

As to Metro's disclosure requirement in the present case, in view of the minimum level of a twenty percent interest and the government's interest in curbing organized crime, which can be difficult even when there are no unknowns, we believe the disclosure provision is not overbroad. Accordingly, the disclosure provision is constitutional.

STANDING

1. Vagueness Claims

Appellants argued that various definitions in the ordinance relating to what constitutes an "adult entertainment establishment" (e.g., "commercial sexual entertainment center," "regular commercial participation," "principal use") were unconstitutionally vague. The trial court ruled that Appellants lacked

standing to challenge the definitions under the vagueness doctrine because Appellants admittedly qualified as adult entertainment establishments. The Court of Appeals agreed.

The general rule is that a party who engages in conduct that is clearly proscribed cannot maintain a claim for vagueness as to that law. *United States v. Williams*, 533 U.S. 285, (2008). Here, Appellants' general characterization or description of their own businesses falls squarely within the listed definitions of "adult entertainment activity" or "adult entertainment establishment" in the ordinance. While one of the Appellants alleges that certain conduct of two of its entertainers may not fall within those definitions, it does not deny that other activities in the establishment would qualify it to fall within the definition of an "adult entertainment establishment." Accordingly, Appellants do not have standing to assert a vagueness challenge.

2. Minors

Appellants argue before us, as they did at the Court of Appeals, that they have standing to challenge the provision in the ordinance which prohibits them from employing minors or allowing minors to enter the premises of an adult entertainment establishment because of the criminal penalties Appellants would be subject to if they (Appellants) violated this provision. This issue was not argued before the trial court. Rather, they argued before the trial court that the provision violated the **minors'** fundamental right to enter such establishments. This is a completely different argument. It is well-settled that parties cannot argue one thing before the trial court and

another to the appellate court. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Accordingly, the issue is not properly before us.

DISCOVERY

Appellants' primary argument is that the trial court erred in failing to allow them to factually litigate their challenges to Metro's claims of the adverse secondary effects of sexually oriented businesses. The voluminous record in this case, which contains abundant evidence submitted by all parties regarding the issue of secondary effects, belies Appellants' assertion. Appellants were given ample opportunity to complete discovery. *See Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). As to Appellants' claim regarding the dispute over Metro's composite reply brief and Appellants' exhibits in support of supplemental brief, it is well-settled that a trial court has broad discretion in resolving disputes in the discovery process, and we will not disturb a discovery ruling absent an abuse of that discretion. *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). We find nothing in the trial court's handling of discovery in this case which amounts to an abuse of discretion.

COMPLETENESS OF CIRCUIT COURT RULING

Appellants maintain that the trial court failed to address several issues they raised. We would remind Appellants that the order was a summary judgment order, and pursuant to CR 52.01, specific findings and conclusions of law are not required with summary

judgments. *See Wilson v. Southward Inv. Co. No. 1*, 675 S.W.2d 10 (Ky. App. 1984).

Summary judgment is proper if the record, when examined in its entirety, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56 03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In reviewing Appellants' remaining claims, we adjudge there were no genuine issues of material fact, and Metro was entitled to judgment as a matter of law. Accordingly, the trial court properly entered summary judgment in favor of Metro.

CONCLUSION

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

All sitting. All concur. Venters, J., concurs by separate opinion in which Abramson and Cunningham, JJ., join.

VENTERS, J., CONCURRING: While I am in full agreement with the conclusions reached by the well-reasoned majority opinion, I write separately to more fully address the provision exclusively relied upon by Appellants in support of their constitutional claims, Section 1(4) of the Kentucky Constitution. Appellants make no federal First Amendment claims, and seek

only to have their arguments addressed on state constitutional grounds.[1] Indeed, the Federal District Court, following removal by Metro, dismissed this very litigation from its docket for lack of jurisdiction on the basis that Appellants raised no federal constitutional claims.

Despite Appellants' disclaimer of their federally-protected constitutional rights, the majority bases its analysis of Section 1(4) of the Kentucky Constitution on federal cases decided under the United States Constitution or on other Kentucky decisions, such as *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006) and *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001) which rest on federal authority because, unlike the case now before us, First Amendment rights, as well as Section 1(4) rights were involved. Usually, those appearing in state courts asserting claims of fundamental constitutional liberties invoke the applicable sections of both federal and state constitutions, taking advantage of whichever, proves to be more advantageous. Here, our analysis need not be tethered to a contemporaneous assertion of federal rights.

I appreciate the recognition of this point by the Court of Appeals in its lengthy opinion in this matter,

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[1] The Appellants appear to pursue this strategy because the Commonwealth of Pennsylvania has a constitutional provision closely mirroring our Section 1(4) (See Pennsylvania Constitution, Article I. § 7), and the Pennsylvania courts have interpreted their provision to provide greater rights in the area of nude dancing than does the federal constitution. *See Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002).

and its attempt to ascertain the scope and breadth of Section 1(4) from Kentucky's own jurisprudential experience. That attempt was not especially fruitful, because as the Court of Appeals found, Kentucky's highest courts have rarely undertaken such analysis. Instead, we have rather consistently chosen to tie our interpretation of the Kentucky Constitution to the ebb and flow of federal constitutional analysis. I see no reason why our interpretation of the Kentucky Constitution is dependent to any degree whatsoever on the federal courts' analysis of the federal constitution. We may, of course, be persuasively informed by their view of analogous provisions, just as we are routinely informed by the decisions of the courts of our sister states, but we should not accept the federal interpretation of federal law as controlling in our interpretation of state law. Indeed, the United States Supreme Court has so held, stating in *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940):

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions . . . [S]tate courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

This Court is the final arbiter of the Kentucky Constitution, and our interpretation of its terms is not

constrained by the words of used in the federal Constitution any more than it is by the Pennsylvania Constitution. Of course we recognize the United States Constitution as the supreme law of the land. We respectfully yield to the authority of the federal courts to interpret the federal Constitution, as we retain exclusive authority to interpret our own.

It has been suggested in this matter that while we are free to interpret state constitutional provisions more broadly than similar provisions of the federal Constitution, we may not conclude that our state constitution offers a lesser degree of protection than the federal. This Court itself has so stated, erroneously as dicta I believe, in *Commonwealth v. Wasson*. 842 S.W.2d 487, 492 (Ky. 1992) (stating "We are not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor, meaning the minimum guarantee of individual rights under the United States Constitution as interpreted by the United States Supreme Court.") *See also Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 418 (Ky. 2005). The statement is, however, a misreading of the opinion of the United States Supreme Court decision in *Oregon v. Hass*, 420 U.S. 714, 719 (1975). In *Hass*, the Oregon courts addressed search and seizure issues predicated on the Fourth Amendment of the federal Constitution, *not* the Oregon Constitution, and the United States Supreme Court simply stated the obvious, that a "state may not impose such greater restrictions *as a matter of federal constitutional law* when this Court specifically refrains from imposing them." *Id.* (emphasis added.) The *Hass*

decision says nothing that fetters the authority of a state's highest court to interpret *state constitutional rights* either more restrictively or less restrictively than the federal constitutional counterpart.

Therefore, addressing the issues presented without regard to the First Amendment interpretations relied upon by the majority, I conclude that the constitutional protections contained in Section 1(4) of our constitution do not extend to nude dancing, and thus the Metro ordinances proscribing this conduct do not violate its provisions. I would accordingly uphold the Metro ordinances at issue as constitutional under Section 1(4), with the exception of the no-touch provision, which I likewise conclude is overbroad under our state constitutional jurisprudence.

Section 1(4) of the Kentucky Constitution provides as follows: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Fourth: The right of freely communicating their thoughts and opinions." This language has been included in each of our four constitutions. In our 1792 Constitution the language was contained in Article XII, §7, and was combined with other language addressing free speech liberties:

> The printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of Government; and no law shall ever be made to restrain the right thereof; *the free communication of thoughts and opinions is one of the invaluable rights of man*, and every citizen may freely speak, write, and print on

> any subject, being responsible for the abuse of that liberty.
>
> (emphasis added).

This same language was carried forward in our 1799 Constitution in Article X, § 7, and in Article XIII, § 9, of our 1850 Constitution. In our 1891 Constitution, the Section 1(4) language was codified in Section I of our Bill or Rights, and the remaining language was incorporated separately into Section 8. The carving out of the Section 1(4) language for separate inclusion in Section I of the Bill of Rights was presumably to emphasize the importance of the liberty interest granted under the provision.

Section 1(4) was presented at the 1890 Constitutional Convention by Mr. Robert Rodes in association with the remaining six provisions contained in the present Section 1 of our Bill of Rights. After presenting the seven provisions of Section 1 of our Bill of Rights, Mr. Rodes continued as follows:

> There you have a general statement of our rights, the seven different subdivisions specifying in what those rights are, and they are taken not only from your Constitution, but from those great symbols of freedom I referred to a moment ago, the Declaration of Independence [the preamble to the bill of rights is taken from the Declaration of Independence] and the Constitution of Virginia of 1776. Do you wish to abolish them? Will any man be prepared to say they are not so? Will you drive them out of your Constitution? The fact that he has advanced these seven distinct propositions into the front

> column, abreast with this main idea, this central proposition of the whole Bill of Rights, certainly ought not to be attributed to any weakness in them; on the contrary, we know very well that while the light, shining on the earth, is mere white light, when concentrated on any object it makes a photograph. This presents a picture here. A picture of what? A picture of free men with certain inalienable and indefeasible rights which can not be taken away; and you see them a living picture before you, and I ask you, and I ask you as a matter of taste, will you drive that out, expel it from the Constitution. I apprehend you will not.

1 1890 Kentucky Constitutional Convention Debates, 435-436.

By characterizing the seven provisions contained in Section I of our Bill of Rights as "A picture of free men with certain inalienable and indefeasible rights which can not be taken away," it is difficult to conceive that the framers reckoned in this picture the right of nude dancing. I do not believe such conduct may properly be characterized as an "inalienable and indefeasible" right. Thus, I believe that the original intent of Section 1(4) was directed to a higher order of expression of thought and opinion, and that the boundaries of the provision do not encompass nude dancing.

There is no question that dancing itself is a recognized form of expressing thoughts and opinions. *Restaurant Ventures*, 60 S.W.3d at 576 ("The ancient Greeks used dance as a means of communication; Indian tribal dances are a means of communicating within the tribes as well as for spiritual

communication; and ballet and other artistic forms of movement communicate ideas to the audiences."). Beyond any doubt Section 1(4) protects the expression of thoughts and opinions communicated in forms of dancing of this character. However, I agree with the observation made in the *Restaurant Ventures* decision that it is difficult to discern the idea that erotic dancing alone is intended to convey. "Mere nude dancing without intent to make a statement, political, social, or otherwise, would seem to be merely for the purpose of sexually arousing the viewer." *Id*. Being of this view, I do not believe nude dancing communicates a thought or opinion so as to come within the protection of Section 1(4).

Moreover, public nudity has always been subject to state regulation, and indecent exposure was a criminal offense under common law. *Case v. Commonwealth*, 313 Ky. 374, 231 S.W.2d 86 (1950). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 573 (1991) (Scalia, J., concurring) ("Public indecency-including public nudity-has long been an offense at common law. *See* 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity 449, 472-474 (1970)."). Public nudity is criminalized under the penal code under the statutes proscribing indecent exposure. KRS 510.148 (first-degree indecent exposure); KRS 510.150 (second-degree indecent exposure). An exception is made for nudist societies, but those groups are extensively regulated. *See* KRS Chapter 232. Mere nudity has never been deemed under our constitution to be expressive of any thought or opinion. It is therefore not constitutionally protected under Section 1(4), and the state and its municipal corporations have broad authority to regulate it under the Kentucky Constitution.

Accordingly, I concur with the majority in upholding the Metro ordinances, excepting the no-touching provision, as constitutional under our state constitution for the reasons stated above. Abramson and Cunningham, JJ., join.

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APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2005-CA-000085-MR
NO. 2005-CA-000090-MR
NO. 2005-CA-000091-MR
NO. 2005-CA-000092-MR
NO. 2005-CA-000100-MR
NO. 2005-CA-000113-MR
NO. 2005-CA-000176-MR

[Filed October 5, 2007]
[MODIFIED: OCTOBER 19, 2007]

CAM I, INC. AND OTHER LITIGANTS AS NAMED ON THE NOTICES OF APPEAL	)
APPELLANTS/CROSS-APPELLEES	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
APPELLEE/CROSS-APPELLANT	)

APPEALS AND CROSS-APPEAL
FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 04-CI-001967

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HOWARD AND MOORE, JUDGES.

MOORE, JUDGE: This is a consolidated case in which Appellants, entities that are engaged in various adult entertainment or sexually oriented businesses, are challenging an ordinance amending Appellee Louisville/Jefferson County Metro Government's Code of Ordinances. Appellants appeal the Order and Judgment of the Jefferson Circuit Court granting in part summary judgment to Metro and denying in part Appellants' motion for temporary injunction. Metro cross-appeals the portions of the Order and Judgment granting in part Appellants' motion for temporary injunction.

I. PROCEDURAL BACKGROUND

In January of 2003, the City of Louisville and Jefferson County were merged to form Metro Louisville. At that time, both entities were involved in litigation in federal court challenging ordinances contained in Chapter 111 of the Metro Code pertaining to adult entertainment. As a result of that litigation, members of the Metro Council initiated a review of the then current status of the law governing adult entertainment businesses. Thereafter, Chapter 111 was amended by Ordinance No. 21, Series 2004, which is the subject of the matter at hand.

While Ordinance 21 contains many sections, those under attack by Appellants include provisions regarding: (1) a licensing requirement to operate an adult entertainment business; (2) anti-nudity provisions; (3) hours of operation restrictions; (4) "no direct payment" to entertainers restrictions; (5) prohibition of the sale of alcohol; (6) "buffer zone" requirements; and (7) no touch provisions.

Appellants filed suit in Jefferson Circuit Court challenging Chapter 111 on numerous state constitutional grounds and moved the court for a temporary restraining order and a temporary injunction enjoining Metro from enforcing or implementing Chapter 111.[1] On the day the complaint was filed, the circuit court entered an order granting temporary injunctive relief enjoining Metro from enforcing Chapter 111 pending further orders of the court.[2]

Thereafter, Metro removed the case to federal court and Appellants filed a motion to remand. While the matter was pending in federal court, Metro sought to dissolve the Jefferson Circuit Court's Order for Temporary Restraining Order/Temporary Injunction. The federal court granted Appellants' motion, deciding that it lacked jurisdiction under 28 U.S.C. § 1441 because Appellants did not make any claims under the

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[1] Appellants properly notified the Attorney General of Kentucky of the action. The Attorney General filed a Notice of Intention Not To Intervene in the matter.

[2] The circuit court later clarified that this was a temporary restraining order.

federal Constitution. Instead, Appellants relied only on state constitutional grounds for their complaint.

Both parties filed substantive motions in Jefferson Circuit Court. Among other pleadings, Metro filed a motion for summary judgment and a supplemental brief in support of its motion to dissolve the temporary restraining order. Appellants filed a supplemental brief in support of their motion for temporary injunction. Both parties having fully briefed the issues and the law, the circuit court entered a final and appealable judgment dissolving the restraining order, granting Metro's summary judgment in part, and denying in part and granting in part Appellants' motion for temporary injunction.

Appellants timely filed a notice of appeal, and Metro filed a cross appeal. A stay pending appeal was granted by this Court.

II. STANDARD OF REVIEW

Both parties agree that the proper standard of review on appeal of a summary judgment is the *de novo* standard. Thus, we review whether the trial court correctly held that there were no genuine issues as to any material fact, and the moving party was entitled to a judgment as a matter of law. *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 366 (Ky. 2005). We conduct *de novo* review of the circuit court's application of the law to the facts. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). In conducting our review, we must consider the record in a light most favorable to the party opposing the motion for summary judgment. *Baker v. Coombs*, 219 S.W.3d 204 (Ky. App. 2007). Summary judgment is proper only

when it would be impossible for the party opposing the motion to produce evidence at trial justifying a judgment as a matter of law in his or her favor. *Horne*, 170 S.W.3d at 366.

III. ANALYSIS

A. SECTIONS OF THE KENTUCKY CONSTITUTION UNDER REVIEW

Appellants contend that numerous provisions of Chapter 111 violate several sections of the Kentucky Constitution. The Kentucky Constitutional sections, in relevant part, at issue are:

> Section 1(4). The right of freely communicating . . . thoughts and opinions.
>
> Section 2. Absolute and arbitrary power over the lives, liberty and property of freeman exists nowhere in a republic, not even in the largest majority.
>
> Section 8. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> Section 14. All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.
>
> Section 26. To guard against transgression of the high powers which we have delegated, We

> Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

Primarily however, Sections 1(4) and 8 are the main sections upon which Appellants rely.

B. CONSTITUTIONAL CONSTRUCTION PRINCIPLES

When considering the constitutionality of legislation, the Court draws all fair and reasonable inferences in favor of the validity of the legislation. *Posey v. Commonwealth.*, 185 S.W.3d 170, 175 (Ky. 2006) (citing *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998)). "'[T]he violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional.'" *Id.* (citing *Kentucky Utilities*, 983 S.W.2d at 499); *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968) ("It is the rule that all presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government.").

The sections of the Kentucky Constitution under present review are included in Kentucky's Bill of Rights, which is recognized as the supreme law of the

Commonwealth.[3] *Id.* at 176 (citing *Gatewood v. Matthews*, 403 S.W.2d 716, 718 (Ky. 1966)). The Supreme Court of Kentucky articulated the standards for deciding state constitutional issues in *Kentucky State Board for Elementary and Secondary Education v. Rudasill*, 589 S.W.2d 877 (Ky. 1979). *See Commonwealth v. Wasson*, 842 S.W.2d 487, 514 (Ky. 1992) (Wintersheimer, J., dissenting). In *Rudasill*, a four-part test was adopted for Kentucky courts reviewing state constitutional issues. Under *Rudasill*, the Court should examine: (1) the text of the Constitution; (2) the intent of the framers; (3) a comparison of the state constitutional provision to the federal counterpart; and (4) how prior judicial opinions interpreted the constitutional provisions in question.

Rather than applying the test in *Rudasill*, Appellants insist that to review the Kentucky Constitution we should turn to other states' constitutional construction. Primarily, Appellants urge the Court to rely heavily on decisions from Pennsylvania for the proper construction of Kentucky's Constitution. It is true that Kentucky's Constitutional Convention relied on language used in Pennsylvania's Constitution when drafting Kentucky's Constitution. However, Appellants would have this Court ignore Kentucky's own jurisprudence in deciding this matter and instead, rely wholly on Pennsylvania's courts for interpreting the constitutional sections at hand. While certainly Kentucky's courts have relied on Pennsylvania jurisprudence in some areas, this is not

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[3] Sections 1 through 26 of the Kentucky Constitution are collectively known as "Kentucky's Bill of Rights." *Posey*, 185 S.W.3d at 176, n. 5.

true for all areas of the law. Indeed, Appellants have not cited this Court to one case wherein Kentucky's courts have relied on Pennsylvania's courts for the parameters and boundaries of free expression or free speech.

To the contrary, a comparison of opinions from courts from the two Commonwealths on similar free speech cases during the same period of time illustrates the inherent flaw in Appellants' reasoning. In 1940, the highest court in Kentucky decided *Reuben H. Donnelley Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 and in 1941, Pennsylvania's Superior Court decided *Commonwealth v. Reid*, 20 A.2d 841 (Pa. Super. 1941). Both cases dealt with a fee imposed on the distribution of written material, such as books, circulars, pamphlets, cards, hand bills, etc. Before any person or corporation could engage in the distribution of such materials, a license had to be obtained.[4]

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[4] The ordinance at issue in the Kentucky case provided in relevant part as follows: "Advertising. For distribution of samples, books, circulars, pamphlets, cards, hand bills, or other device, the sum of twenty-five ($25.00) Dollars per year, or $1.00 per day, and but one person at a time allowed to operate under said license."

The ordinance at issue in the Pennsylvania case provided in relevant part as follows: "Section 1. Be it enacted by the Burgess and Town Council of the Borough of Clearfield in Council regularly assembled, that from and after the passage of this ordinance every person canvassing from house to house, or on the public streets in the Borough of Clearfield, Pennsylvania, for the purpose of selling or soliciting orders for, by samples or otherwise, . . . printing, stationery, books . . . magazines, periodicals . . . shall take out a license from the Burgess, and pay the fees hereinafter required before selling or offering for sale anything as aforesaid within the Borough . . . . The fees . . . vary from $5 to $10 per day,

In the Kentucky case, the appellant was convicted of violating the ordinance for engaging in the business of distributing circulars at residences advertising the wares of a local druggist. He defended, in part, arguing that the ordinance offended his constitutional right of freedom of speech and press without abridgment. In upholding the ordinance at issue, Kentucky's highest court held as follows:

> It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as between any person or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax.
>
> . . . .
>
> If the right of the state or a municipal subdivision merely to exact a reasonable license tax for the privilege of carrying on the business of distributing advertising matter, or even of publishing a newspaper, for private profit, be

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and $100 to $200 per month, where vehicles are used. Where sales are made without vehicles, $2 per day, per applicant."

> denied as an abridgment of freedom of speech or press, then there is a clash with the fundamental social and political philosophy and constitutional mandate of equality of right and equality of burden. The constitution is not to be construed as destroying itself. Its principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other. The business of advertising possesses no virtue justifying immunity from the ordinary license or other taxes. Freedom of speech or publication does not authorize it.

Reuben H. Donnelley Corp., 140 S.W.2d at 1026 (internal case names and citations omitted).

In the Pennsylvania case, *Reid*, 20 A.2d 841, a husband and wife were arrested and found guilty for selling and offering to sale, periodicals and magazines relating to their religious beliefs as Jehovah's witnesses, without first taking out a license or paying the required fee.[5] Contrary to the decision rendered just a year earlier in Kentucky, Pennsylvania's highest court struck the Pennsylvania ordinance relying on United States Supreme Court precedent. The Court in *Reid* held that the Supreme Court cases "hold, in effect, that ordinances forbidding the distribution or sale on the streets of a municipality of pamphlets, magazines, or periodicals, not in themselves harmful, unless a license permitting it has first been obtained

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[5] The fact that the Pennsylvania matter involved literature relating to religion was not used as a basis for the court's decision. Moreover, the content of the literature was not analyzed at all by the court.

from the proper municipal authority, are void as in conflict with the constitutional provisions against laws abridging the freedom of the press." *Reid*, 20 A.2d at 842.

Interestingly, Kentucky's court reviewed many of the same Supreme Court cases as the *Reid* court and came to a contrary decision on an almost indistinguishable issue. Consequently, it is not legally accurate to assume that because Kentucky borrowed language from Pennsylvania's Constitution that Kentucky is forever married to or agrees with Pennsylvania's interpretation of free speech or free expression. The case analysis just presented illustrates that Kentucky traditionally has different views regarding free speech and free expression than Pennsylvania.

A survey of Pennsylvania cases involving free expression evinces that Pennsylvania does have a history of granting an expansion of rights beyond those given by the United States Constitution, as illustrated in *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), upon which Appellants urge this Court to heavily rely. However, Appellants have not cited this Court to Kentucky case law which justifies an equivalent expansive right to free expression as that given in Pennsylvania. And, upon its own research, this Court has not located any Kentucky case law analogous to those of Pennsylvania on the issue.

Moreover, even a cursory review of the cases primarily relied upon by Appellants illustrates that they do not represent Kentucky's view of free expression. Appellants spend valuable space in their brief citing to Pennsylvania, as well as Oregon cases,

wherein the courts give much broader protections to the form of expression that is presently under review. Consistent with correct constitutional construction, Appellants cite to the development of the Kentucky Constitution. But, rather than cite this Court to relevant Kentucky case law or constitutional construction doctrines, they cite to Pennsylvania and Oregon cases.

As earlier noted, Kentucky relied on language used in the Pennsylvania Constitution for the development of its own Constitution. However, the constitutional debates, at least for Kentucky, shed no real light on the subject at hand. We most certainly doubt that as our forefathers were debating the guiding doctrines of our Commonwealth at its inception and later in refining our Constitution, that they were considering erotic dancing, nude or otherwise, as speech. Despite volumes written long after the adoption of our present Constitution on the topic at hand, we are simply left to make an educated guess on the intent of the drafters of our Constitution regarding free expression in the realm of adult entertainment businesses.

We look for cases decided close in time to the present Kentucky Constitution to ascertain the framers' intent in drafting the provisions at issue. Intriguingly, in a case decided within twenty-five years after the adoption of the 1891 Constitution, no protection was given to speech much milder when compared to the "expressive conduct" offered at Appellants' businesses. In *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915), the appellant, a minister, used the following language while preaching a sermon in 1914: "Some men will stand around the depot, stores, the post office, and street corners, and

watch the women pass, and size them up, the foot, ankle, and form, and they would be willing to give five dollars for the fork." *Id.*

For using these words, the minister was convicted and fined $67.50 for having committed a breach of the peace. The warrant on which he was charged read:

> "The said Delk did, in Pulaski county [sic], Kentucky, on or about the 2d day of November, 1914, unlawfully commit a breach of the peace by using obscene, vulgar, and indecent language in the presence of and to an assembly of people, men, women, and children, which language was obscene, indecent, and offensive, and was calculated to insult the hearers and to provoke an assault, and was in other respects disorderly; the language used and words uttered being unknown to the court, against the peace and dignity of the commonwealth [sic] of Kentucky."

Id., 178 S.W. at 1130.

Delk was charged under common law breach of the peace because the "obscene language used . . . was calculated to insult his hearers and to provoke an assault." *Id.*, 178 S.W. at 1131. In determining what constituted a breach of the peace under common law, the court analyzed prior cases and treatises on the subject, many dating back into the 1800's. The court concluded that "'breach of the peace' is quite broad, and includes, not only all violations of the public peace or order, but acts tending to the disturbance thereof, including acts of public turbulence or indecorum, in violation of the common peace and quiet." *Id.*, 178 S.W.

at 1132 (citing *King v. Commonwealth*, 32 Ky. Law. Rep. 79, 105 S.W. 419 (1907)).

The court thereafter held that

> [a]pplying this definition to the nasty and obscene words used by appellant, we are of opinion they come within this definition, and constituted a breach of the peace. There was no possible excuse for the use of such language in the pulpit or elsewhere; and that fact alone is sufficient to incite all right-thinking persons to indignation, if not violence. *People v. Burman*, 154 Mich. 150, 117 N.W. 589, 25 L.R.A. (N.S.) 251; *State v. White*, 18 R. I. 473, 28 Atl. 968. The appellant's excuse that he was merely rebuking the sin of impurity, that he did not intend to disturb or embarrass any one [sic], but made the statement as a warning and rebuke to sin, is wholly without justification. It does not avail appellant for him to say he has a right to propagate his religious views. That right is not denied; but one will not be permitted to commit a breach of the peace, under the guise of preaching the gospel. If one be licensed to use the pulpit for such disgraceful performances as the appellant admits he was guilty of in this case, then women and children are to be insulted with impunity by the use of the most obscene vulgarity in places where they go to worship. . . . .
>
> We are clearly of [the] opinion that the language used by appellant constituted a breach of the peace.

Id.

Historically, it is apparent that Kentucky does not openly embrace forms of expression that some other states do. Although Appellants attempt to persuade the Court that Kentucky, like other states, has a long history of openly embracing any and all expression without restriction, the *Delk* case illustrates that Appellants' theory is not legally sound.

When the *Delk* case is compared to the cases on which Appellants rely, it is readily apparent that Kentucky does not embrace those views of free expression held by those states. Take for example, *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005), which Appellants urge us to use to inform our decision. Certainly, *Ciancanelli* contains a rather comprehensive review of competing constitutional theories, but unlike Kentucky in construing free expression under its Constitution, Oregon places no reliance on federal jurisprudence. Early restrictions on sexually explicit or obscene expressions among adults were not well established at the time of the adoption of Oregon's constitution. *Id.* at 615 (citing *State v. Henry*, 732 P.2d 9 (Or. 1987)). Nonetheless, relying on the framework established in *State v. Robertson*, 649 P.2d 569 (Or. 1982), the *Ciancanelli* court determined that the adult entertainment statute under review was content based and struck it down. The court noted that "lawmakers are precluded from enacting restrictions on speech solely on the theory that the speech is connected with some adverse consequences and that, absent the speech, the consequences are, to some indefinable degree, less likely." *Ciancanelli*, 121 P. 3d at 635, n. 31 (citing *Robertson*, 649 P.2d 569). The Oregon court struck, as unconstitutional under the Oregon Constitution, a statute which made it a crime to "'direct, manage, finance or present' a 'live public

show' in which the participants engage in 'sexual conduct.'" *Id.*, 121 P. 3d at 614-15 (citing ORS §167.062).[6]

In addition, Appellants ask us to rely upon *Pap's A.M.*, 812 A.2d 591. Like *Ciancanelli*, the Pennsylvania Supreme Court in *Pap's A.M.* adhered to its state's long history of granting greater protection to erotic expressive conduct. In *Pap's A.M.*, the Pennsylvania Supreme Court held an ordinance

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[6] In the *Ciancanelli* case, the defendant had been charged with violations of ORS Chapter 167 for two counts of promoting a live sex show. *Ciancanelli*, 121 P.3d at 615. Oregon Revised Statute §167.062 provides in part:
"(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sadomasochistic abuse or sexual conduct.
(4) Violation of subsection (3) of this section is a Class C felony.
(5) As used in . . . this section unless the context requires otherwise:
(a) 'Live public show' means a public show in which human beings, animals, or both appear bodily before spectators or customers.
(b) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded."

For purposes of the statute, "sexual conduct" is defined as "human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification." ORS §167.060(10). In relying on its interpretation of the Oregon Constitution, the *Ciancanelli* Court held that the statute which criminalizes this conduct, ORS §167.062, was content based and struck it down as unconstitutional.

prohibiting completely nude dancing to be content-based and a violation of the freedom of expression guaranteed by Article I, Section 7, of Pennsylvania's Constitution.

We strongly disagree with Appellants' reliance on the constitutional interpretation given by other states to their respective Constitutions. We believe our Commonwealth's Bill of Rights to be of such importance that Kentucky jurisprudence must be invoked in the interpretation of it. And, unlike Pennsylvania or Oregon, Kentucky, with limited exceptions, has a history of interpreting its Bill of Rights consistently with the federal Constitution. *See Wasson*, 842 S.W.2d at 513 (Wintersheimer, J., dissenting). In his dissent, Justice Wintersheimer pointed out that

> decisions of this Court in the more modern era indicate an unwillingness to engage in random revision of the Kentucky Constitution by judicial fiat. *See Estep v. Commonwealth*, Ky., 663 S.W.2d 213 (1983) in which it is held that Section 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment; *Jordan v. Commonwealth*, Ky., 703 S.W.2d 870 (1985) which provides that Section 13 of the Kentucky Constitution affords no greater protection than does the Federal Fifth Amendment; *Commonwealth v. Willis*, Ky., 716 S.W.2d 224 (1986) which indicates that Section 11 of the Kentucky Constitution provides no greater protection than does the Federal Sixth Amendment and *Delta Airlines, Inc. v. Commonwealth, Revenue Cabinet*, Ky., 689

S.W.2d 14 (1985) which holds that the standards for classification under the Kentucky Constitution are the same as those under the Fourteenth Amendment to the Federal Constitution.

Commonwealth v. Foley, Ky., 798 S.W.2d 947 (1990) [*overruled on other grounds by Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003)] provides that Section 1(4) of the Kentucky Constitution gives no more protection than does the Federal First Amendment; *Tabler v. Wallace*, Ky., 704 S.W. 2d 179 (1985) notes that Sections 1, 2 and 3 of the Kentucky Constitution suffice to embrace the Equal Protection Clause of the Federal Fourteen Amendment; *Cain v. Commonwealth*, Ky., 556 S.W.2d 902 (1977) announces that the right of counsel guaranteed by Section 11 of the Kentucky Constitution is no greater than the right of counsel in the Federal Sixth Amendment; *Glasson v. Tucker*, 477 S.W.2d 168 (1972) holds that Section 1 of the Kentucky Constitution is coterminous with the Federal First Amendment; *Ray v. City of Owensboro*, Ky., 415 S.W.2d 77 (1967) states that Section 1(5) of the Kentucky Constitution is coterminous with the Equal Protection Clause of the Federal Fourteenth Amendment. *Rawlings v. Butler*, Ky., 290 S.W.2d 801 (1956) states that Sections 1 and 5 of the Kentucky Constitution are coterminous with the religious clauses of the Federal First Amendment; *Fischer v. Grieb*, 272 Ky. 166, 113 S.W.2d 1139 (1938) holds that *514 Section 3 of the Kentucky Constitution is interchangeable with the Equal Protection Clause of the Federal

> Fourteenth Amendment. *Commonwealth v. Ashcraft*, Ky.App., 691 S.W.2d 229 (1985) held that the Federal First Amendment actually provided more free speech rights than does the Kentucky Constitution.

Wasson, 842 S.W.2d at 513- 514 (Wintersheimer, J., dissenting).

Notwithstanding the above,

> [f]rom time to time in recent years [the Kentucky Supreme] Court has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States. However, when [the Court has] differed from the Supreme Court, it has been because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent. [The Court has] admonished against "novel theories to revise well-established legal practice and principle" and stated the prevailing rule as follows:
>
> > While we have decided several recent cases protecting individual rights on state constitutional law grounds, our stated purpose is to do so only where the dictates of our Kentucky Constitution, tradition, and other relevant precedents call for such action. (Citations omitted).

Commonwealth v. Cooper, 899 S.W.2d 75, 77-78 (Ky. 1995) (quoting *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992)).

In *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 953 (Ky. 1995), the Court succinctly outlined the relationship between the two Constitutions deciding that:

> [w]e determine that the legislation does not violate the United States Constitution although a theorist may correctly assert that under Kentucky's Constitution the rights of association and petition may not be absolutely synonymous with that of the federal constitution. We are not convinced in this case that freedoms of petition and association under the Kentucky Constitution should be afforded a broader scope or a different analysis than the corresponding rights under the United States Constitution. *Commonwealth v. Foley*, Ky., 798 S.W.2d 947, 953 (1990).

We also find Appellants' argument that the Kentucky Constitution gives greater protection than the United States Constitution unpersuasive in light of overwhelming Kentucky case law wherein issues under Kentucky's free speech clauses were analyzed relying on federal constitutional standards. For example, in *Commonwealth v. Ashcraft*, 691 S.W.2d 229, 230 (Ky. App. 1985), this Court reviewed a case in which the appellee had been charged with violating KRS 161.190, providing that "[n]o person shall upbraid, insult or abuse any teacher of the public schools in the presence of the school or in the presence of a pupil of the school." The appellee had successfully

moved to dismiss the complaint against him on the basis that KRS 161.190 was unconstitutionally vague and overbroad in violation of both the United States Constitution and the Kentucky Constitution. Despite the fact that the appellee's challenge was hinged on Section 1(4) and 8 of Kentucky's Constitution, as well as the federal Constitution, this Court relied on the United States Supreme Court's interpretation of the First Amendment of the federal Constitution to decide the case. In fact, in relying upon federal jurisprudence, this Court held that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Id.* 691 S.W.2d at 232 (citing *Heffron v. Int. Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981)). Relying on federal jurisprudence, in spite of a combined state and federal constitutional challenge, this Court struck down KRS 161.190 as unconstitutional.

Pivotal to illustrate the inherent flaw in Appellants' argument that Kentucky's Constitution provides greater protection to free speech than the federal Constitution, although the Court in *Ashcraft* was reviewing both the State and federal Constitution, it let its dismay be known that it did not want to give as much protection as the federal Constitution but believed it had no other alternative. The court in *Ashcraft* stated

> [f]rom what we have said herein, we do not intend to convey the message that the legal philosophy is ours but rather one foisted upon us by the Supreme Court of the United States. Under the overbreadth doctrine, the First Amendment has been stretched to a point of

> torture in order to permit such individuals as Paul Cohen (*Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L.Ed. 2d 284 (1971)), David Rosenfeld (*Rosenfeld v. New Jersey*, 408 U.S. 901, 92 S. Ct. 2479, 33 L.Ed. 2d 321 (1972)), and Wilbert Brown (*Brown v. Oklahoma*, 408 U.S. 914, 92 S. Ct. 2507, 33 L.Ed.2d 326 (1972)), to do and say whatever they want in total disregard of where they may be or who may be present . . . .
>
> There could be little doubt that KRS 161.190 was enacted to protect the authority and dignity of our teachers, and nothing we have said should be construed that this Court subscribes to a contrary view of the position of those professionals. Nevertheless, in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed. 2d 731 (1969), written in an atmosphere of what its author referred to as ". . . this relatively permissive, often disputatious society," the court commenced the decimation of school authority under First Amendment arguments similar to those made in the case at bar. Even though we have been compelled to reach the result that we did, our views are more closely aligned to those of Justice Black, dissenting in *Tinker*.

Ashcraft, 691 S.W.2d at 233.

Ashcraft evidences that, from any vantage point, this Court views Section 1(4) and Section 8 of Kentucky's Constitution as at most consistent with, rather than more expansive than, the protections provided by the federal Constitution. Furthermore,

Ashcraft illustrates that but for the inherent legal truth that the federal Constitution provides a floor of constitutional protections, *see Associated Industries of Kentucky*, 912 S.W.2d at 952, this Court may not have granted as much protection under Kentucky's Constitution as the federal Constitution in the *Ashcraft* case.

Other cases also illustrate the point that Kentucky courts have interpreted free speech under the same standards as the federal Constitution. In *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), the Court reviewed a matter involving disciplinary proceedings brought against a judge who was a candidate for the Kentucky Supreme Court for announcing his views on certain legal issues. The Court reviewed the issue under both the federal Constitution and the Commonwealth's Constitution. On this, the Court noted that "[t]he United States Constitution guarantees the right of an individual to free speech. Accordingly, Congress can make no law abridging the freedom of speech. First Amendment, U.S. Constitution. Similarly, Section Eight of the Kentucky Constitution provides that '[e]very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.'" *Id.*, 803 S.W.2d at 954.

As with *Ashcraft*, the Court reviewed a free speech issue under both the State and federal Constitution, but yet relied solely on federal jurisprudence under the First Amendment to decide the case. The Court held that the "right of free speech is not absolute, however. States have the authority to regulate this conduct within certain limitations if in the public interest." *Id.* (citing *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct.

920, 86 L. Ed. 1262 (1942), *overruled on other grounds by Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975)).

And, in *Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways*, 928 S.W.2d 344 (Ky. 1996), a challenge was brought against a statute regulating billboards based on Section 1(4) and Section 2 of the Kentucky Constitution. Despite the fact that the case was brought solely on Kentucky constitutional grounds, the Court determined that the review must first focus on the then current state of Kentucky law on the subject, and then consider how it relates to the then existing federal law on the subject. *Id.*, 928 S.W.2d at 346-347. After a survey of Kentucky case law on the issue of the constitutionality of statutes regulating billboards, the Court turned to federal law and the United States Constitution for a determination on the central issue in the case: "whether the regulation [was] no more broad or no more expansive than is necessary to serve the substantial governmental interest asserted." *Id.*, 928 S.W.2d at 348. Accordingly, the Court, in deciding a matter brought under the Kentucky Constitution, wholly relied on the interpretation of the federal Constitution to articulate the standard applicable to the Kentucky Constitution on free speech concerns.

And, in *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999), the Kentucky Supreme Court again affirmed its determination that the Kentucky Constitution provides protection no greater than, but co-extensive with, the First Amendment to the United States Constitution. (Citing *Foley*, 798 S.W.2d 947). In *McDonald*, the Court, as it has historically done, relied

on the First Amendment to the United States Constitution in addressing a free speech issue. It succinctly stated that "[t]he right to free speech is not absolute and states are permitted to regulate it within certain limitations if the regulation is within the public interest." *Id.* (citing *Valentine*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 2d 1262).

Foley and *McDonald* do not stand alone. Kentucky courts, in other cases, have specifically held that the freedom of speech provisions in the Kentucky Constitution are similar to that of the United States Constitution. *See Summe v. Judicial Retirement and Removal Com'n*, 947 S.W.2d 42 (Ky. 1997); *Lee v. Commonwealth*, 565 S.W.2d 634, 637 (Ky. App. 1978) ("Our State Constitution §1 and §8 secures the right of free speech similar to that protected by the First Amendment to the Constitution of the United States.").

Beyond these cases, the Kentucky Supreme Court has squarely held that the interpretation of the First Amendment of the United States Constitution by the United States Supreme Court reflects a proper interpretation of Section 1(4) of the Kentucky Constitution. *Foley*, 798 S.W.2d at 952.

These cases and others evince that Kentucky has long construed Section 1(4) and Section 8 of the Kentucky Constitution consistently with the United States Constitution, granting no greater protection to free speech and free expression. Thus, to the degree there is confusion on the issue, the Court holds that free speech and free expression protections under the Kentucky Constitution are consistent with those in the United States Constitution. Consequently, all

arguments advanced by Appellants relying on a higher level of protection under the Kentucky Constitution beyond that granted by the First Amendment are wholly without merit and will not be further reviewed.[7]

C. APPLICATION OF INTERMEDIATE SCRUTINY

Appellants' challenge to Chapter 111 is based on freedom of expression and speech which Appellants contend are protected by Section 1(4) and Section (8) of the Kentucky Constitution. The United States Constitution is a floor to the level of protection given to individual rights, and whether or not this Court agrees, freedom of expression under the First Amendment includes conduct that contains or communicates an erotic message, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), including nude and semi-nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring); *see also California v. LaRue*, 409 U.S. 109, 118, 93 S. Ct. 390, 397, 34 L. Ed. 2d 342 (1972 (Rehnquist, J., majority) ("at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression"), *overruled in part on other grounds by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95

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[7] Because we conclude that freedom of expression and speech under the Kentucky Constitution are on an even par with those under the First Amendment to the United States Constitution, we, at times, cite to case law interpreting and referencing the First Amendment.

S. Ct. 2561, 45 L. Ed. 2d 648 (1975); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (Stevens, J., plurality) ("the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 1391, 146 L. Ed. 2D 265 (2000) (O'Connor, J. plurality) ("Being in a 'state of nudity' is not an inherently expressive condition. As [the Court] explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment's protection.") (citations omitted).

It matters not whether this Court may or may not believe that the type of conduct under review is constitutionally protected. Rather, based upon Kentucky's reliance upon the interpretations given to the First Amendment to define the boundaries of conduct protected under Kentucky's Bill of Rights, we are bound by precedent to conclude that this type of expression is afforded some protection under the Kentucky Constitution, albeit the "outer ambits" of the Constitution. *Hendricks v. Commonwealth*, 865 S.W.2d 332, 336 (Ky. 1993). According to federal law, "[d]ancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, *in the absence of some contrary clue*, is eroticism, carrying an endorsement of erotic experience." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 409 (6th Cir. 1997) (quoting

Barnes, 501 U.S. at 581, 111 S. Ct. at 2468, 115 L. Ed. 2d 504 (Souter, J., concurring) (emphasis added in *DLS*)).[8] However, the legal fact that protection is granted to this form of expression should by no means be confused with elevating this type of expression with pure speech or speech for which we would send our sons and daughters off to war. *See Young*, 427 U.S. at 70, 96 S. Ct. at 2451, 49 L. Ed. 2d 310.

We pause to stress that pure speech is given much more protection and is reviewed under a much higher level of scrutiny. When erotic expression presumably seeks to convey a message enhanced by semi-nudity or nudity, its expressive value is given lesser protection than other forms of speech. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. App. 2001) (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504 (plurality opinion)). It is well settled that this type of expression falls to the outer fringes of protected speech via an expressive message. *Id.* (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504). Thus, its

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[8] A prior panel of this Court reviewing a similar issue regarding erotic dancing noted its disagreement with a finding that erotic dancing alone conveys a message. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572, 576 (Ky. App. 2001). It stated that "what idea erotic dancing alone conveys, this court is unable to discern. Mere nude dancing without intent to make a statement, political, social, or otherwise, would seem to be merely for the purpose of sexually arousing the viewer." *Id.* Nevertheless, the Court determined that it was bound by the United States Supreme Court's interpretation of the First Amendment made applicable to the states through the Fourteenth Amendment. *Id.* We wholly agree with the Court's analysis on this in *Restaurant Ventures*.

protection is marginal, at best. *Id.* (citing *Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460, 115 L. Ed. 2d 504).

Of course in considering a regulation impacting free speech, the threshold matter to be determined is the level of scrutiny to be applied by the Court. If the regulation is aimed at the content of the message, generally the highest level of scrutiny, known as strict scrutiny, is applied. Legislation is "content based" if it regulates protected speech based on the message conveyed. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989). On the other hand, legislation is typically "content neutral" if the regulation is "justified without reference to the content of the regulated speech," thus serving a purpose not related to the content of the expression. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95, 104 S. Ct. 3065, 3069-70, 82 L. Ed. 2d 221 (1984). Accordingly, government "may regulate speech when necessary to advance legitimate state interests, but the First Amendment prohibits the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." *Flying J Travel Plaza*, 928 S.W.2d at 349 (citing *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)).

When the regulation of speech is content-neutral, the government may, within constitutional bounds, regulate even protected expression. Accordingly, government can use time, place and manner restrictions so long as they do not target the content of the expression itself. *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 382-83 (E.D. Ky. 1993) (citing *Barnes*, 501 U.S. at 560, 111 S. Ct. at 2460, 115

L. Ed. 2d 504); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality opinion). Regulations are content neutral even when they have an incidental impact on protected speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

Metro government unmistakably sets out in the preamble of the Ordinance that its purpose is to protect its citizenry from secondary effects associated with adult entertainment businesses. Speech, unpopular or not, can and often does have secondary effects. And, without reference to the content of the speech, local governments may constitutionally enact time, place or manner restrictions to help curb these secondary effects, while at the same time allowing avenues for the free exercise of speech or expression. From any vantage point, Chapter 111 has the purpose of regulating activities surrounding adult entertainment businesses not in regard to the message allegedly conveyed therein, but to combat the secondary effects associated with these businesses. Accordingly, we believe these restrictions to be content neutral. Justice Kennedy's concurrence in *Alameda Books*, clearly sets forth that intermediate scrutiny is to be applied in such cases.[9]Alameda Books, 535 U.S.

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[9] Because Justice Kennedy's concurrence is the narrowest opinion joining in the judgment of the Court, it may be regarded as the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . ." (Citations omitted).

at 449, 122 S. Ct. at 1728, 152 L. Ed. 2d 670. (Kennedy, J., concurring) ("The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.").[10]

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[10] There does appear to be some confusion over whether a government's efforts at eliminating, or at least limiting, the negative secondary effects of adult entertainment businesses to protect the public is content neutral or content based. The majority view is that these types of restrictions are content neutral. *See e.g.*, *Barnes*, 501 U.S. 560, 111 S. Ct. 3456, 115 L. Ed. 2d 504 (Souter, J. concurring); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 131-34 (6th Cir. 1994). On the other hand, in *Alameda Books*, in his concurrence, Justice Kennedy analyzed *City of Renton*, wherein the Court considered whether a zoning ordinance that is a time, place, or manner restriction is content based or content neutral. *Alameda Books*, 535 U.S. at 448, 122 S. Ct. at 1741, 152 L. Ed. 2d 670 (citing *City of Renton*, 475 U.S. at 48, 106 S. Ct. 925, 89 L. Ed. 2d 29). Because the ordinance under review in the *City of Renton* case "[was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, [and] not to suppress the expression of unpopular views" the Court had designated the ordinance as content neutral. *Id.* (quoting *City of Renton*, 475 U.S. at 48, 106 S. Ct. 929, 89 L. Ed. 2d) (internal quotation marks omitted in *Alameda Books*). Justice Kennedy, in his concurrence in *Alameda Books*, noted that despite the "content neutral" designation given by the Court in *City of Renton*, the Court had treated theaters that specialized in adult films differently from other kinds of theaters. *Id.* Justice Kennedy reasoned that because the theaters showing adult films were treated differently from other theaters not showing adult films that "[t]hese ordinances are content based, and [the Court] should call them so." *Id.* Nevertheless, Justice Kennedy's statement does not put adult entertainment businesses on par with other content-based restrictions nor did he advocate a change in the level of scrutiny afforded adult entertainment businesses.

And, recently the Kentucky Supreme Court ruled that intermediate scrutiny applies when the secondary effects of sexually oriented businesses are targeted.

Significantly, Justice Kennedy went on to state that

> [n]evertheless, . . . the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-27, 112 S. Ct. 501, 116 L.Ed. 2d 476 (1991) (Kennedy, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumptions that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

Id.

It is evident that Justice Kennedy's concurrence has resulted in confusion over whether ordinances aimed at curbing the negative secondary effects of adult entertainment businesses are content based or content neutral. *See e.g., Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005). Even courts that believe such restrictions to be content based apply intermediate scrutiny if two conditions are met: 1) the ordinance regulates speech that is sexual or pornographic in nature; and 2) the primary motivation behind the regulation is to prevent secondary effects. *Gammoh*, 395 F.3d at 1123-24 (citing *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1164-65 (9th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 434, 122 S. Ct. at 1733-34, 152 L. Ed. 2d 670)).

Commonwealth v. Jameson, 215 S.W.3d 9 (Ky. 2006), *reh'g denied*.

Because the Court decided *supra* that Kentucky offers no greater protection in the realm of free speech and expression than the United States Constitution and because Kentucky has a long and well-established history of relying on federal jurisprudence in this area, it is proper for the Court to follow Justice Souter's concurring opinion in *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504, wherein he adopted the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968), to review cases falling under intermediate scrutiny. *Jameson*, 215 S.W.3d 9; *see also Restaurant Ventures*, 60 S.W.3d at 576-77; *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). The *O'Brien* test requires that to survive intermediate scrutiny an ordinance must: (1) be within the constitutional power of the government; (2) further an important or substantial governmental interest; (3) provide an asserted governmental interest unrelated to the suppression of free expression; and (4) ensure that any incidental restriction on alleged free expression is no greater than essential.

1. Application of the *O'Brien* test

The first *O'Brien* requirement is easily met in this matter. Metro possesses the power to protect its community against negative secondary effects through its police power. It is constitutionally sound that freedoms protected under the Kentucky Constitution may nonetheless be limited by enactments in the interest of the public health or welfare. *Economy Optical Co. v. Kentucky Bd. of Optometric Examiners*,

310 S.W.2d 783 (Ky. 1958). It is a basic tenet of our governmental structure that government, pursuant to its police power, "has wide latitude to adopt ordinances which promote the health, safety, morals or general welfare of the people." *Lexington Fayette County Food and Beverage Ass'n v. Lexington Fayette Urban County Gov't*, 131 S.W.3d 745, 749 (Ky. 2004) (citing *U.S. Mining & Exploration Natural Resources Co., Inc. v. City of Beattyville*, 548 S.W.2d 833 (Ky. 1977)). "Among the police powers of government, the authority to promote and safeguard public health is a high priority." *Id.* (citing *Graybeal v. McNevin*, 439 S.W.2d 323 (Ky. 1969)). "Indeed, [a] legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government." *Posey*, 185 S.W.3d at 175 (citing *Manning v. Sims*, 308 Ky. 587, 213 S.W. 2d 577, 592 (Ky. 1948)) ("when the power of the Legislature to enact a law is called into question, the court should proceed with the greatest possible caution and should never declare an act invalid until after every doubt has been resolved in its favor") (quotation and citation omitted in *Posey*). "The concept of public welfare is broad and inclusive. The values it protects are spiritual as well as physical, aesthetic as well as monetary." *Hendricks*, 865 S.W.2d at 338 (citing *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954)). A governmental entity's attempts "to preserve or improve the quality of urban life is one which must be accorded high respect." *Id.* (citing *Young*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310). For these reasons, the Court "must always accord great deference to the legislature's exercise of these so-called 'police powers,' unless to do so would 'clearly offend[] the limitations and prohibitions of the constitution.'" *Posey*, 185 S.W.3d at 175 (citing *Manning*, 308 Ky. 587, 213 S.W.2d at 592; *Medtronic*,

Inc. v. Lohr, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)) ("'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).

It has long been recognized "[t]hat adult entertainment bars often generate harmful 'secondary effects' on neighborhoods . . . ." *Bright Lights*, 830 F.Supp. at 385-86 (citing *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29 (upholding strict zoning ordinance aimed at adult theatres, where city had proven such harmful "secondary effects"); *Barnes*, 501 U.S. at 582, 111 S. Ct. at 2469, 115 L. Ed. 2d 504 (Souter, J., concurring); *Friedman v. Valentine*, 30 N.Y.S.2d 891, 894 (N.Y. Sup. 1941) ("That an unsupervised cabaret offers a tempting field for abuses and crimes is almost axiomatic."), *aff'd*, 42 N.Y.S. 2d 593 (1943).

Governmental entities are not required "before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities[.]" *City of Renton*, 475 U.S. at 51, 106 S. Ct. at 931, 89 L. Ed. 2d 29; *see also Jameson*, 215 S.W.3d 9. Local governments may rely upon previous findings in judicial opinions about secondary effects resulting from the presence of adult entertainment businesses. *City of Renton*, 475 U.S. at 51, 106 S. Ct. at 931, 89 L. Ed. 2d 29; *Jameson*, 215 S.W.3d 9; *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265 (plurality opinion). Furthermore, local governments are permitted to "rely, in part, on 'appeal to common sense,'" in enacting

regulations governing adult entertainment businesses. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1186 (10th Cir. 2003) (quoting *Alameda Books*, 535 U.S. at 439, 122 S. Ct. at 1728, 152 L. Ed. 2d 670). Accordingly, we determined that Chapter 111 easily satisfies the first prong of *O'Brien*.

As to the second *O'Brien* prong, the preamble of Chapter 111 sets forth that its aim is targeted at the secondary effects of adult entertainment businesses and curbing the negative secondary effects. These goals have been recognized as important government interests. *DLS*, 107 F.3d at 410 ("courts have repeatedly found the prevention of crime and disease to satisfy this part of the *O'Brien* test") (citing *Barnes*, 501 U.S. at 582, 111 S. Ct. at 2468-69, 115 L. Ed. 2d 504; *City of Renton*, 475 U.S. at 48, 106 S. Ct. at 929, 89 L. Ed. 2d 29; *Triplett Grille*, 40 F.3d at 134). Furthermore, "a city's interest in attempting to preserve the quality of urban life, is one that must be accorded high respect." *City of Renton*, 475 U.S. at 50, 106 S. Ct. at 930, 89 L. Ed. 2d 29.

Rather than second guessing local governments, as a general rule, courts should accept the expressed purpose of local governments. *See Barnes*, 501 U.S. at 582, 111 S. Ct. at 2468, 115 L. Ed. 2d 504. It is permissible for local governments to rely upon studies and experiment with their own regulation of secondary effects inherent with adult entertainment businesses. *See Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670; *Jameson*, 215 S.W.3d 9. Courts are cautioned not to act as "super legislatures" "appr[ising] the wisdom" of the decision making of local governments. *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29 (quoting *Young*, 427 U.S. at 71,

96 S. Ct. at 2453, 49 L. Ed. 2d 310). Accordingly, the second prong is likewise easily met.

As to the third prong, because the Court has already determined that Chapter 111 is content neutral, this is the same as a determination that the ordinance is unrelated to the suppression of free expression. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 3071, 82 L. Ed. 2d 221 (1984).

The final prong of *O'Brien* requires us to determine whether the restriction is no greater than essential to further the government interest. However, no greater than essential does not mean least-restrictive means available. *Ward*, 491 U.S. at 798, 109 S.Ct. at 2757, 105 L. Ed. 2d 661. This standard will be met where "'any incidental impact on the expressive element of nude dancing is *de minimis*.'" *Jo-Bet, Inc. v. City of Southgate*, 415 F. Supp. 2d 725, 731 (E.D. Mich. 2006) (quoting *Pap's A.M.*, 529 U.S. at 301, 120 S. Ct. at 1397, 146 L. Ed. 2d 265). As stated by the majority in *Ward*, 491 U.S. at 799-800, 109 S. Ct. at 2757-2758, 105 L. Ed. 2d 661, "narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and any resulting burden on speech is not substantially broader than necessary to achieve the governmental goal. *Id.* (Internal quotation marks and citations omitted). In distinguishing narrow tailoring from least-intrusive means, the Supreme Court noted that a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.*, 491 U.S. at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d 661.

Having determined that the first three *O'Brien* factors are met, we will in turn analyze the challenges brought by Appellants against the specific provision of Chapter 111 to determine if they are no greater than essential to further the stated government interest.

a. Nudity

Section 111.35(A) prohibits nudity at adult entertainment businesses, and Appellants claim that therefore this section of Chapter 111 is unconstitutional. Having rejected Appellants' theory that the Court should rely heavily on Pennsylvania case law, we likewise reject Appellants' request that we cast aside Kentucky and federal jurisprudence on the issue of nudity in adult entertainment businesses.

"Ordinances that ban nude dancing are generally considered to be content neutral. Increase in sex crimes, social disease and general depreciation of the neighborhood, are secondary effects of adult establishments which the courts have recognized as being within the government's power to control." *Restaurant Ventures*, 60 S.W.3d at 577. Quoting *Pap's A. M.*, 529 U.S. at 292, 120 S. Ct. at 1393-94, 146 L. Ed. 2d 265, at length, the Court in *Restaurant Ventures*, 60 S.W.3d at 577-78, stated

> [e]ven if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude

dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood.

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Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis*. And as Justice STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L.Ed. 2d 310 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and "few of us would march our sons or daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.

And, according to the analysis in *Barnes*,

we do not think that when Indiana applies its statute to the nude dancing in these nightclubs

> it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Barnes, 501 U.S. at 570-571, 111 S. Ct. at 2463, 115 L. Ed. 2d 2456.

And, this Court has stated that

> [t]he amount of clothing required does not interfere with the expression sought to be conveyed by clogging, Appalachian dancing, the two-step, Indian tribal dancing, belly dancing, and striptease and/or the traditional burlesque comedy.

Hendricks, 865 S.W.2d at 336.

Because we have concluded *supra* that the interpretation of the free expression clauses under

Kentucky's Constitution are parallel to those under the federal Constitution and, based on the above case law, we hold that any impact that Chapter 111 has on Appellants' right to free expression conducted while in a state of nudity is *de minimis* and leaves ample capacity for federally protected expressive conduct. *See Jameson*, 215 S.W.3d at 27-28 (citations omitted). Accordingly, we conclude that any incidental restriction on free expression is no greater than essential and meets the fourth *O'Brien* prong.

b. Hours of operation

Section 111.18 of Chapter 111 precludes an adult entertainment business from remaining open for business between the hours of 1:00 a.m. and 9:00 a.m. on any day. Under the prior Ordinance, many of the Appellants' businesses were open longer hours. Appellants set forth a three-prong analysis in support of their argument, much of which surrounds their theory that federal jurisprudence plays no role under freedom of expression within the bounds of the Kentucky Constitution. For reasons as stated *supra*, we reject these arguments.

This Court has previously reviewed this issue analyzing an ordinance that prohibited adult entertainment businesses from operating between the hour of 1:00 a.m. and 3:00 p.m.-- six hours more than the ordinance under present review. *See Restaurant Ventures*, 60 S.W.3d at 580. In *Restaurant Ventures*, we held that "[t]he regulation of operating hours of adult entertainment establishments is a valid exercise of the government's power to regulate those establishments." 60 S.W.3d at 581.

There are sound reasons under local government's police powers for hour restrictions. The Court in *Bright Lights* upheld a restriction that allowed establishments to remain open for only eight and one-half hours. The Court held that "[t]he restriction of hours serves the legitimate purpose of confining to evening hours the illicit and immoral practices that accompany [adult entertainment businesses] and concentrate around them." *Brights Lights*, 830 F. Supp. at 389.

The Sixth Circuit has also upheld strict hour restrictions. In *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 411 F.3d 777, 789 (6th Cir. 2005), the Court upheld a midnight-close restriction finding that it was a reasonable time, place or manner restriction. The Court concluded that the restriction generally furthered the governmental interest in protecting public health, safety and welfare, and in combating already recognized harmful secondary effects of crime and other public health and safety problems associated with nude dancing and caused by the presence of those establishments specifically. *Id.*, 411 F.3d at 790. Even more importantly, in considering allowing avenues for constitutionally protected speech, the Sixth Circuit in *Deja Vu of Cincinnati* found that because the adult entertainment businesses could be open for twelve hours per day, six days per week, ample channels for expressive communication were available. *Id.*, 411 F.3d at 791.

Beyond courts within the Sixth Circuit, many federal courts have had occasion to consider hour-of-operation restrictions and found them to be constitutional under the "secondary effects" test. *See*

Center for Fair Public Policy, 336 F.3d 1153; *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Comm'n on Adult Entm't. Est.*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

Chapter 111 allows adult entertainment businesses to be open substantially longer than the hours held to be constitutional in many cases, including *Deja Vu of Cincinnati* and *Bright Lights*. Accordingly, Chapter 111 exceeds the acceptable hours of operation in other cases, leaving ample channels available for expressive conduct in Appellants' business, which is only minimally protected anyway. Thus, this restriction meets the fourth prong under *O'Brien*.

c. Prohibition against alcohol sales

Section 111.30 prohibits establishments which hold adult entertainment business licenses from also obtaining liquor licenses. Appellants contend that this section of the ordinance is preempted by state statute, citing to a series of Kentucky cases analyzing the regulation of alcohol. However, we have previously rejected similar arguments twice. *See Restaurant Ventures*, 60 S.W.3d at 581 ("The ordinance regulates the operating hours not because they sell alcoholic beverages, but because of the sexually oriented nature of the entertainment provided."); *Mr. B's Bar and Lounge, Inc. v. City of Louisville,* 630 S.W.2d 564, 566 (Ky. App. 1981) ("The ordinance seeks to regulate the businesses of the appellants not because they sell alcoholic beverages, but rather because of the

sexually-oriented nature of the entertainment provided."). Having previously upheld similar ordinances restricting the sale of liquor at adult entertainment businesses, we are not inclined to overturn those decisions now.

Further, we are not persuaded by the cases cited by Appellants. For example, Appellants cited to *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994), wherein the Court struck a *contract* between a business and the City as unenforceable on the basis that the government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights.[11] *Id.*, 23 F.3d at 1077. In his concurrence, Judge Nelson explained that in light of *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504, there was no reason why the City could not, "pursuant to properly drafted laws or ordinances, prohibit saloonkeepers from placing barebreasted women dancers on public exhibition." *G & V Lounge, Inc.*, 23 F.3d at 1079-80 (Nelson, J., concurring).

And, indeed, many jurisdictions have done just that. The case of *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003) gives an excellent and in-depth analysis of this area of the law. In *Ben's Bar*, the Court reiterated that the ordinance then under review did not impose restrictions on entertainers' ability to convey an erotic message. To the contrary, it

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[11] The agreement at issue provided that in exchange for the City's approval of the request for a liquor license, the business would not permit any topless entertainment on its premises. *G & V Lounge, Inc.*, 23 F.3d at 1072.

only prohibited adult entertainment businesses from serving alcohol to customers while nude or semi-nude dancing is taking place. The Court in *Ben's Bar* concluded that this was not a restriction on expressive conduct; rather, it was a prohibition of the non-expressive conduct of serving and consuming alcohol during the performances of expressive conduct. The First Amendment does not constitutionally entitle patrons, or even dancers, to have alcohol available while the performance is taking place. *Id.*, 316 F.3d at 726. The Court succinctly stated that

> [t]he regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either . . . . [C]itizens . . . may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary* [*v. City of Warner Robins*], 311 F.3d [1334] at 1338 [(11th Cir. 2002)] (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments . . .). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its

> patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

Ben's Bar, 316 F.3d at 728. We agree with this well-reasoned analysis and find no other reason to decide otherwise.

Metro has added this restriction to curb the secondary effects of adult entertainment businesses, and it is well established. "Liquor and sex are an explosive combination . . . ." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001). Erotic performances in establishments serving liquor have "a long history of spawning deleterious effects" which include "prostitution and the criminal abuse and exploitation of young women." *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999).

In sum, because this Court has previously upheld similar regulations and because we agree that there is no constitutionally guaranteed right to consume or sell alcohol at the same time as an erotic performance is taking place, we find no constitutional infirmity with this section of Chapter 111.

d. Staging requirements

Appellants contend that the staging requirements in Chapter 111 are unconstitutional. Pursuant to Chapter 111.35(B) it is a violation for any employee to appear "semi-nude" unless he or she is located

> [a]t least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor. The six (6) foot

> requirement is measured from the edge of the stage where the semi-nude employee is located to the patron seating or standing area, or, if patrons are allowed to sit at the stage, from the edge of the stage to a line or other barrier six feet from the edge beyond which employees are allowed to appear semi-nude.

In support of their argument, Appellants rely on two Oregon cases, *City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005) and *Ciancanelli*, 121 P.3d 613. However, as established *supra*, Oregon applies much broader protection to adult entertainment establishments, even to the point of allowing live sex shows. Appellants cannot cite this Court to one Kentucky case showing even a remotely similar stance on the issue.

On the other hand, numerous courts, including this Court, have routinely upheld buffer zones. *See Restaurant Ventures*, 60 S.W.3d 572; *DLS*, 107 F.3d 403; *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 274 F.3d 377, 396-97 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073, 122 S. Ct. 1952, 152 L. Ed. 2d 855 (2002); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672 (W.D. Ky. 2002); *Threesome Entertainment v. Strittmather*, 4 F. Supp.2d 710 (N.D. Ohio 1998); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1553 146 L. Ed. 2d 459 (2000) (ten feet); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986). In *Restaurant Ventures*, 60 S.W.3d at 580, this Court reviewed an ordinance that provided, in relevant part that:

> [n]o person in an adult entertainment establishment shall engage in any form of entertainment or dancing except while said person is positioned in or occupying an entertainment area, . . . and while the person so dancing, performing, displaying or exhibiting is positioned not less than six (6) feet from any patron or spectator.

The Court held that the buffer zone allowed a reasonable distance between the patrons and performers. This resulted in a decreased opportunity for sex, contract of social diseases, and rendered easier the enforcement of the "no touch" rule. The Court agreed with the government that the buffer zone was substantially related to the ability to control crime and disease, which are beyond question legitimate governmental interests.

Appellants do not even address *Restaurant Ventures* on this issue in their brief. Rather, they rely on cases from other jurisdictions.[12] While many of the ordinances in the cases cited *supra* have differing buffer zone requirements,[13] the courts are not in the business of micromanaging local governments. ""The judiciary should not second-guess the judgment of local

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[12] Having already determined that free expression and free speech under the Kentucky Constitution is consistent with the First Amendment, we reject Appellants' contention that cases from other jurisdictions better define Kentucky's Constitution than cases from our own Commonwealth.

[13] For example, in *Deja Vu of Nashville*, 274 F.3d 377, a three-foot buffer zone was at issue, while in *Kev*, 793 F.2d 1053, a ten-foot buffer zone was under review.

government officials.'" *Jameson*, 215 S.W.3d at 35 (quoting *Alameda Books*, 535 U.S. at 451, 122 S. Ct. at 1743, 152 L. Ed. 2d 670 (Kennedy, J., concurring)).

We agree with the wisdom of the Court in *DFW Vending, Inc. v. Jefferson County*, 991 F. Supp. 578, 594 (E.D. Tex. 1998) that "[s]ix feet is sufficiently close for a person to view and appreciate an artistic dance performance. Indeed, that distance is closer than distances at which artistic dance performances at theaters and concert halls are generally viewed."[14]

Appellants further contend that the buffer zone provisions violate Section 1(6) of the Kentucky Constitution, which guarantees the freedom of association. They also maintain that freedom of association is reviewed under strict scrutiny, relying on *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 3249, 82 L. Ed. 2d 462 (1984). The crux of this argument is that performers in adult entertainment establishments have a right, under Section 1 of the Kentucky Constitution, to freely associate without governmental interference. Any arguments advanced by Appellants that freedom of association under the Kentucky Constitution is broader than the federal Constitution lack all merit. The Supreme Court of Kentucky has previously rejected this argument. *See Associated Industries of Kentucky*, 912 S.W.2d at 953 (citing *Foley*, 798 S.W.2d at 953).

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[14] We do not intend this statement as a litmus test of a six-foot buffer zone for every case dealing with this issue.

The United States Supreme Court has recognized two types of "freedom of association." *Dallas v. Stanglin*, 490 U.S. 19, 23-24, 109 S. Ct. 1591, 1594, 104 L. Ed. 2d 18 (1989);[15] *see also Gold Diggers, LLC v. Town of Berlin, Connecticut*, 469 F. Supp. 2d 43 (D.Conn. 2007). The first type of freedom of association includes the "'choice[ ] to enter into and maintain certain intimate human relationships.'" *Dallas*, 490 U.S. at 24 (quoting *Roberts*, 468 U.S. at 617-618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462). These types of associations are the sorts of traditional personal bonds that have "'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237, 110 S. Ct. 596, 611, 107 L. Ed. 2d 603 (1990), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) (quoting

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[15] The United States Supreme Court has held that its

> "decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion."

Stanglin, 490 U.S. at 24, 109 S. Ct. at 1594, 104 L. Ed. 2d 18 (quoting *Roberts*, 468 U.S. at 617-618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462).

Roberts, 468 U.S. at 618-619, 104 S. Ct. at 3249-50, 82 L. Ed. 2d 462). As such, these relationships receive "protection as a fundamental element of personal liberty." *Roberts*, 468 U.S. at 618, 104 S. Ct. at 3249, 82 L. Ed. 2d 462.

The second type of freedom of association is the right to associate for the purpose of engaging in expressive activity as protected by the First Amendment. *Stanglin*, 490 U.S. at 24, 109 S. Ct. at 1595, 82 L. Ed. 2d 462. The *Stanglin* Court stated, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Stanglin*, 490 U.S. at 25, 109 S. Ct. at 1595, 82 L. Ed. 2d 462.

It is not evident under which class Appellants are proceeding. First, they claim their rights are described in *Roberts*, 468 U.S. at 618, 104 S. Ct. at 3250. But, in the next sentence, they claim that they are "engaged in 'First Amendment' speech-related activities." The class described in *Roberts* includes the types of association that have traditional personal bonds and that have "'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideas and beliefs.'" *FW/PBS*, 493 U.S. at 237, 110 S. Ct. at 611 (quoting *Roberts*, 468 U.S. at 618-19, 104 S. Ct. at 3249-50, 82 L. Ed. 2d 462). Appellants have not asserted that the associations for which they seek protection are traditional and intimate relationships as envisioned under *Roberts*.

The Supreme Court of the United States, nonetheless, has held that the types of "relationships" that might be formed in Appellants' establishments do not fit the first category under *Roberts*. *See FW/PBS*, 493 U.S. at 237, 110 S. Ct. at 611, 107 L. Ed. 2d 603 (holding that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'") (quoting *Roberts*, 468 U.S. at 618-19, 104 S. Ct. at 3249-3250, 82 L. Ed. 2d 462); *see also Stanglin*, 490 U.S. at 24, 109 S. Ct. at 1595 (dance hall patrons coming together to engage in recreational dancing is not protected by First Amendment).

Rather, the staging restrictions, including the buffer zone and no touch provisions, "implicate[] the right to associate for expressive purposes." *Gold Diggers*, 469 F. Supp. 2d at 65 (citing *Deja Vu of Nashville*, 274 F.3d at 396). "The right to associate for expressive purposes, however, is not absolute. 'Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Deja Vu of Nashville*, 274 F.3d at 396 (quoting *Roberts*, 468 U.S. at 623, 104 S. Ct. at 3252, 82 L. Ed. 2d 462).

The Court in *Deja Vu of Nashville* upheld the staging restrictions of a three-foot buffer zone against a freedom of association attack concluding that these restrictions went no further than necessary to guard against negative secondary effects of adult entertainment establishments. 274 F.3d at 397 (citing

DLS, 107 F.3d at 412-13) (upholding a six-foot buffer zone). Consequently, the Court upheld the restrictions.

Appellants attempt to capitalize on the fact that in *Deja Vu of Nashville* the staging requirement was only three feet, intimating that only restrictions of three feet or less will meet constitutional muster. We disagree. *Deja Vu of Nashville* did not create a litmus test of a three-foot buffer zone to survive constitutional attacks. Moreover, it is not the business of the Court to second guess local government on how to govern their communities. The buffer zone requirement at issue is content neutral and furthers Metro's legitimate interests in curbing secondary effects of adult entertainment businesses, including minimizing sexual contact between entertainers and customers, guarding against sexually-transmitted diseases. The dancers and customers can still engage in their "expressive association." Courts have held that

> "[s]eparating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions . . . . Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises . . . . While the dancer's erotic message may be slightly less effective from [several] feet, the ability to engage in the protected expression is not significantly impaired."

Jakes, Ltd., Inc., v. City of Coates, 284 F.3d 884, 891 (8th Cir. 2002) *cert. denied*, 537 U.S. 948, 123 S. Ct. 413, 154 L. Ed. 2d 292 (2002) (quoting *Kev*, 793 F.2d at 1061) (footnotes omitted in *Jakes, Ltd.*).

Appellants also attack the buffer zone requirement maintaining that they have "evidence substantiating . . . drastic consequences" resulting from the six-foot buffer zone. Appellants included the affidavit of Brian Franson and a diagram of Appellant PT's club thereto in their brief. According to the diagram, there are fourteen areas where dancers perform spaced throughout the building on one floor. Five of these areas are larger stages, with the remaining areas being the tops of bars or smaller tables for more "intimate" performances. Based on Appellants' diagram, using a one-eighth inch scale, four of the larger staging areas are from approximately eight-to-nine feet in diameter, and the largest staging area is over nine-feet wide and at least eight-feet long. One staging area on a bar is nearly sixteen-feet long, and another is nearly six-to-eight-feet long. Appellants contend that under the six-foot buffer zone restriction, there will be "little-to-no" space left for customers while entertainers are performing in Appellant PT's club.

Appellants rely on *J.L. Spoons, Inc. v. City of Brunswick*, 49 F. Supp. 2d 1032 (N.D. Ohio 1999), contending that the type of evidence Appellants present is sufficient to justify striking the buffer-zone requirement. However, *J.L. Spoons* actually supports a contrary conclusion.

The Court in *J.L. Spoons* reasoned that "[p]rohibiting physical contact between semi-nude dancers and patrons is a legitimate way to eradicate the secondary effects of adult-oriented cabarets. Moreover, a buffer zone may be necessary 'to ensure that the ban on contact i[s] enforceable.'" *Id.*, 49 F. Supp. 2d at 1045 (quoting *DLS*, 107 F.3d at 412). The

Court in *J.L. Spoons* recognized that six-foot buffer zones have been upheld. *Id.* (citing *DLS*, 107 F.3d 412-13). However, the reason the buffer zone was struck in *J.L. Spoons* was that it was a ten-foot buffer zone. The Court reasoned that

> [w]hile six feet may reasonably be expected to keep people outside of each other's reach, ten feet goes beyond the length of two arm spans. The City has failed to show how such a long distance requirement furthers the City's interests, and, consequently, the ten-foot buffer zone may not satisfy the second requirement of *O'Brien*. In any event, the ten-foot buffer zone must also be understood in conjunction with the two-foot stage height requirement. Unlike *DLS*, the disputed section in this case requires performers to both remain ten feet from patrons and remain on a stage at least two feet from the floor. Although this Court finds the two-foot stage requirement not to be substantially greater than necessary to achieve the City's goals, this requirement helps render the ten-foot requirement unconstitutional. That is, if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease.

Id. at 1045-46.

In the *J.L. Spoons* case, the business produced evidence tending to show that the ten-foot buffer zone would destroy the market for adult cabarets. *Id.* (quoting *DLS*, 107 F.3d at 413) ("if ordinance were

intended to destroy the *market* for adult cabarets, it might run afoul of the First Amendment") (emphasis added). The Court determined that it must consider the effect of a ten-foot barrier on the entire market, not just one establishment. *Id.*, 49 F. Supp. 2d at 1046. Reasoning that "[i]f a ten-foot buffer would substantially impact the seating at a relatively large establishment like [the business under review], then its impact on smaller adult entertainment businesses would be severe." *Id.*

However, as in the *DLS* case and numerous other cases, a six-foot buffer zone has been upheld. The Court in *J.L. Spoons* recognized that a six-foot buffer zone may reasonably be expected to keep people outside of each other's reach and accordingly, supports the government's interest in eliminating contact between the dancers and customers. On the other hand, according to the Court in *J.L. Spoons*, a ten-foot buffer zone goes beyond the length of two arm spans, and the government could not show such a length furthered its interest in curbing the negative secondary effects that creating a buffer zone enhanced. Consequently, we conclude that *J.L. Spoons* does not support Appellants' arguments.

Appellants also advance an argument that Justice Kennedy's concurrence in *Alameda Books* compels a conclusion that Chapter 111 is constitutionally deficient. They contend that Justice Kennedy's "'proportionality'" standard will be violated "[i]f a law has a minimal ***two percent impact upon speech and expression-related activities***." (Appellants' brief at p. 38, emphasis in original). Nowhere in his concurrence does Justice Kennedy set forth such a

standard.[16] To the contrary, in the example referenced by Appellants that Justice Kennedy offers, he posits that the restrictions enacted to curb secondary effects may actually be eliminated with no impact on speech, and both the government and the businesses may have their interests served. *Alameda Books*, 535 U.S. at 453, 122 S. Ct. at 1743, 152 L. Ed. 2d 670.

While the six-foot buffer zone will restrict the viewing areas available at Appellants PT's business as it is presently configured, we are struck by the fact from the diagram that the staging areas are scattered in such a manner that almost any buffer zone requirement would impact the viewing areas. Certainly, adult entertainment businesses could

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[16] The example given by Justice Kennedy referenced by Appellants is as follows:

"If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation-a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served." *Alameda Books*, 535 U.S. at 452-53, 122 S. Ct. at 1743, 152 L. Ed. 2d 670.

become very creative in structuring their staging areas so that nearly any buffer zone requirement would restrict viewing areas; we are not compelled to condone this.

Moreover, we do not believe the law compels the result Appellants seek. Under the *City of Renton* standard, Metro must only afford PT's and the other Appellants a "'reasonable opportunity to open and operate.'" *Jakes Ltd.*, 284 F.3d at 891 (quoting *City of Renton,* 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29). Our inquiry is not concerned with the economic impact of restrictions on a particular business; instead, "'we consider the economic effects of the ordinance in the aggregate, not at the individual level.'" *Id.* (quoting *DLS*, 107 F.3d at 413).

In *DLS*, 107 F.3d at 413, the Court reasoned that it

> consider[s] the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects on the individual theater. *See Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665-66 (9th Cir. 1996). Although the plaintiffs did not present the district court with evidence regarding the effect of the ordinance on the market for adult cabarets in Chattanooga, the district court did find that DLS could comply with the ordinance by installing brass rails at a cost of about $5,000. We therefore infer that, in the aggregate, the ordinance does not foreclose a "reasonable opportunity" to operate an adult cabaret.

> Accordingly, we join those courts that have determined that similar buffer-zone requirements are sufficiently narrowly tailored to be valid regulations under the First Amendment. *See BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986) (six feet); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. (ten feet); *Colacurcio v. Kent*, 944 F. Supp. 1470, 1477 (W.D. Wash. 1996) (ten feet); *Zanganeh v. Hymes*, 844 F. Supp. 1087, 1091 (D. Md.1994) (six feet); *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500, 1506 (M.D. Fla. 1992) (three feet).

Even if Appellant PT or other Appellants will have to do renovations to their establishments to comply with the buffer zone restrictions, this argument has previously been rejected by the courts. *DLS*, 107 F.3d at 413. All that is constitutionally required is that Metro Government refrain from effectively denying Appellants a "'reasonable opportunity to open and operate an adult [business] within the city . . . .'" *Deja Vu of Nashville*, 274 F.3d at 397 (quoting *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29). Accordingly, while complying with the buffer zone restrictions *may* reduce PT's and the other Appellants' profits, they have not shown that they will not have a reasonable opportunity to operate within the borders of Jefferson County. *See e.g., id.*

Relying on federal jurisprudence, Kentucky cases, and in all respects the purpose for which Chapter 111 was drafted, we conclude that the *O'Brien* test is met against the challenges brought by Appellants.

D. PRIOR RESTRAINT REGARDING LICENSING FEES REQUIREMENTS

Appellants contend that Chapter 111 constitutes a prior restraint because they cannot engage in the defined conduct without prior governmental approval, and consequently this is "invalid in-and-of itself under the plain language of the Kentucky Constitution." At its heart, Appellants' challenge is based on their theory that the licensing scheme of Chapter 111 is a prior restraint on its face. Their attack is based on the premise that because "no one can engage in the defined conduct within the county without prior governmental approval from the Director," it is an unconstitutional prior restraint.

Appellants begin their targeted prior restraint attack on Chapter 111 by initially contending that the Kentucky Constitution offers far greater protection than the United States Constitution. Having determined *supra* that this is an erroneous statement of the law and Appellants' having failed to substantiate this statement with any Kentucky or otherwise binding precedent, we outright reject this portion of Appellants' argument.

Appellants' next attack on Chapter 111 is for the licensing fees charged. Appellants concede that the purpose of these fees is, at least in part, to defray the costs of the background checks necessary to enforce the criminal disability provisions. And, the record supports that these fees are necessary and used to offset costs typically associated with sexually oriented businesses. Nonetheless, Appellants rely on *Murdock v. Pennsylvania*, 319 U.S. 105, 113, 63 S. Ct. 870, 87 L. Ed. 1292 (1943), for the proposition that a state may

not impose a charge upon the exercise of a constitutional right. However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir. 1997). Fees directed at adult entertainment establishments "must be necessary 'to achieve an overriding governmental interest.'" *Bright Lights*, 830 F. Supp. at 385 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582, 103 S. Ct. 1365, 1370, 75 L. Ed. 2d 295 (1983)). These fees must go toward defraying the costs incurred in policing the activities associated with adult entertainment businesses or their negative secondary effects. *Id.* (citing *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1574 (M.D. Tenn. 1989)). "That adult entertainment bars often generate harmful 'secondary effects' on neighborhoods has long been recognized." *Id.* (citing *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931, 89 L. Ed. 2d 29) (upholding strict zoning ordinance aimed at adult theatres, where city had proven such harmful "secondary effects"); *Barnes*, 501 U.S. at 560, 111 S. Ct. at 2456, 89 L. Ed. 2d 29.

In *Bright Lights*, the Court decided that a $5,000 licensing fee on adult entertainment businesses was reasonably related to the cost of administering and enforcing ordinances covering sexually oriented businesses. 830 F. Supp. at 386. And, in numerous other cases, courts have upheld licensing fees for engaging in protected activities to offset costs associated with regulating the business. *See e.g.*, *Deja*

Vu of Nashville, 274 F.3d at 395; *City of Elko v. Abed*, 677 N.W.2d 455 (Minn. Ct. App. 2004); *Steverson v. City of Vicksburg, Miss.*, 900 F. Supp. 1, 16-17 (S.D. Miss. 1994).

Kentucky courts have held in accord. *See Associated Industries of Kentucky*, 912 S.W.2d at 951-52 ("The trial court correctly enunciated that states may not impose a charge upon the exercise of a First Amendment right, but fees may be imposed upon activities protected by the First Amendment if the fees are necessary to achieve an underlying, governmental interest and such fees are used to defray the cost of policing such activity.") (citing *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 515, 582, 103 S. Ct. 1365, 1370, 75 L. Ed. 2d 295 (1983); *Bright Lights*, 830 F. Supp. at 385-86). Finding record evidence that adult entertainment businesses have caused Metro to incur additional costs associated with these businesses and finding support in the case law for the circuit court's decision, we find no error on this issue.

E. ECONOMIC IMPACT CONCERNING DIRECT TIPPING

Appellants take issue with §111.35(C) which provides that

> [i]t shall be a violation of this chapter for any employee, while semi-nude in an adult business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to

> any employee, while said employee is semi-nude in an adult entertainment establishment.

Appellants bring this attack based on an economic impact theory. We agree with their citation to *Buckley v. Valeo*, 424 U.S. 1, 65, 96 S. Ct. 612, 656, 46 L. Ed. 2d 659, n. 76 (1976), that "money" is "a necessary and integral part of many, perhaps most, forms of communication." However, customers may still give gratuities to performers, but they may not do so directly. The restriction is a limited burden on free speech rights and well within constitutional boundaries.

Appellants next quote *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980), stating "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials." However, this statement has been taken out of context. The full quote in *Hart* is that

> [w]hile it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, we simply do not find those exceeded by the relocation burden involved here. Zoning and other regulations for the public welfare frequently are an economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not exempt them from the consequences of an otherwise valid regulation. Again we find *Mini-Theatres* dispositive:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. . . .
>
> The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. 427 U.S. at 78, 96 S. Ct. at 2456 (Powell, J., concurring).

Hart, 612 F.2d at 827-828.

Consequently, *Hart* actually holds contrary to Appellants' argument. In fact, it recognizes that under the government's police power, businesses may suffer adverse economic impacts for the public welfare. And, in case after case, perhaps more so than in any other area of business, this truth has been upheld in the realm of adult entertainment businesses. *See City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d 29 ("'[t]he inquiry for First Amendment purposes is not concerned with economic impact.'") (quoting *Young*, 427 U.S. at 78, 96 S. Ct. at 2456, 49 L. Ed. 2d 310 (Powell, J., concurring)); *Deja Vu of Nashville*, 274 F.3d at 397; *DLS*, 107 F.3d at 413; *Jakes, Ltd.*, 284 F.3d at 891-92. Accordingly, we find no error.

F. STANDING ISSUES

Appellants contend that the trial court erred on issues of standing in three respects: (1) that Appellants cannot bring a void for vagueness challenge to Chapter 111, (2) that Appellants cannot attack the provisions governing minors, and (3) that Appellants lack standing to challenge the criminal disability section.

1. Vagueness challenge

The circuit court concluded that Appellants lacked standing to challenge the definitions under §111.02 under a vagueness doctrine as to what would constitute an "adult entertainment establishment because [they] admittedly qualify as such establishments." Accordingly, the circuit court found it would be "improper for Plaintiffs to assert the rights of third parties not before the Court." Appellants argue to the contrary: they have not admitted to qualifying as such establishments under §111.02.

Section 111.02 of Chapter 111 includes within its realm of the regulation of adult amusement arcades, adult book stores, adult novelty centers, adult motion picture theaters, adult stage show theaters, adult video cassette rental centers, cabarets, commercial sexual entertainment centers, and self-designated adult entertainment centers. Appellant Kentucky Restaurant Concepts, Inc., d/b/a P.T.'s Showclub, describes itself in the complaint as a "cabaret style nightclub that features live, non-obscene, clothed, nude, [and] semi-nude performance dance entertainment presented to the consenting adult public." Appellant Blue Movies, Inc., d/b/a Love

Boutique "presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines." Consequently, Appellants' own description of their respective operations belie their contention that Chapter 111 is vague and does not apply to them. We agree with the circuit court that Appellants have admitted to being adult entertainment establishments and easily fit into the categories delineated in §111.02. Accordingly, we agree with the circuit court that Appellants lack standing to bring a vagueness challenge on this issue.

2. Minors

The second standing issue deals with whether Appellants can bring challenges to the restrictions on minors pursuant to Section 111.17 which provides in relevant part that

> (A) An operator or employee of an adult entertainment establishment shall not permit a person under 18 years of age to be employed by or to enter the establishment.
>
> (B) An adult entertainment establishment shall, at all times, cause the entrance of the establishment to be so attended as to insure compliance with the requirements contained in subsection (A) of this section.

Appellants contend that the circuit court erred in deciding that they lacked standing to challenge Section 111.17, the employee age requirement section of the Ordinance, prohibiting minors from being employed by or entering adult entertainment businesses. Before

this Court, Appellants contend that the circuit court erred because they "are not asserting the rights of minors; they are asserting ***their own rights*** to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them***." (Appellants' brief at p. 41; emphasis in original). According to their present argument, because the Ordinance prohibits minors from being employed by or entering their businesses, if a minor does so, it is Appellants who are subject to penalties under Sections 111.99 and 111.43; thus, they contend they have standing because they are asserting their own rights, not those of minors.

Their present argument is, however, a horse of a different color as compared to their argument before the circuit court. At the trial court level, the Appellants did not present this argument; rather, they argued that Section 111.17 impeded the fundamental rights of minors to enter their establishments. Indeed, they dedicated five pages of their trial court brief to the fundamental rights of minors; yet, not one of the plaintiffs is a minor. Appellants abandoned that argument before this Court and presented a wholly new argument: "the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see e.g.*, §111.17(a) ("an ***operator or employee*** of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment")). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting ***their own rights*** to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them***." (Appellants' brief at p. 41). Because this argument is presented for the first time on appeal, we decline to review it. *See*

Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky. App. 1980). Moreover, parties cannot present one argument to the trial court and another to the appellate court. *Carrier v. Commonwealth*, 142 S.W.3d 670, 677-78, n. 4 (Ky. 2004).

To the degree that Appellants' one sentence statement in a forty-eight page brief before this Court alleging that they clearly are "entitled to assert standing of their patrons" is meant to relate to minors, none of the cases to which they cite in footnote 31 of their brief so holds. Moreover, nothing Appellants have cited in the record evinces that their patrons are minors or that they intend to solicit minors as patrons. To the contrary, several Appellants have described themselves in their complaint as offering entertainment "to the consenting adult public" or that "admission is limited only to those members over the age of 21 . . . ." Thus, if the above statement is directed toward asserting claims on behalf of their belief that minors have a fundamental right to be employed by or enter adult entertainment establishments and Appellants are asserting the rights of their minor "patrons," the averments in their complaints belie this argument. Accordingly, because Appellants asserted in their complaint that their patrons are "consenting adults" or that they limit admission to persons over the age of twenty-one, minors are not their patrons and therefore, assuming *arguendo*, that the law would allow Appellants to assert the rights of their patrons, Appellants lack standing to do so for minors.

3. Criminal disability provisions

Appellants contend the circuit court erred in holding they lacked standing to challenge the

constitutionality of the criminal disability provisions. They also insist the circuit court erred in upholding the provisions as constitutional, arguing they are a clear prior restraint on constitutionally protected expressive conduct.

As for standing, we agree with the circuit court that Appellants lacked standing to challenge the constitutionality of the provisions. The United States Supreme Court has held that to challenge the constitutionality of criminal disability provisions, an applicant must show in the record he or she was convicted of one of the enumerated crimes set forth in the provisions, and the conviction is the reason for the applicant having been denied a license. *FW/PBS*, 493 U.S. 231, 110 S. Ct. 609, 107 L. Ed. 2d 603, ("[S]tanding ... must affirmatively appear in the record." (internal quotations and citations omitted)). A thorough review of the record does not present any evidence to this Court that any of the Appellants were denied a license, or had a previously issued license revoked, because of a conviction for one of the crimes set forth in the criminal disability section of the Ordinance.

Nonetheless, even if Appellants had standing, the circuit court correctly found the provision to be constitutional. Courts have routinely held criminal disability provisions constitutional under the rationale that they further the government's interest in curbing secondary effects of adult entertainment businesses, while only imposing incidental burdens on First Amendment rights. *See Deja Vu of Nashville*, 274 F.3d 377; *Kentucky Restaurant Concepts, Inc. v. City of Louisville, Jefferson County, Kentucky*, 209 F. Supp. 2d 672 (W.D. Ky. 2002). Similarly, the criminal disability

provisions in this case do not provide Metro officials discretionary authority to prohibit adult entertainment businesses and their employees from obtaining licenses. Rather, the provisions set forth an objective standard for Metro to follow that does not completely prohibit the constitutional right of erotic expression, but only temporarily serves as a method to curb the secondary effects of the adult entertainment industry. Accordingly, we find no error by the circuit court on this issue.

G. COMPLETENESS OF RULING BY THE CIRCUIT COURT

Appellants complain that the circuit court failed to rule on a number of issues in their brief. First, they contend that the circuit court did not address their doctrine of unconstitutional condition arguments under §111.39. To the contrary, the circuit court did fully address this issue in its opinion. Appellants present no arguments on the merits of this issue. Consequently, because the circuit court did address this issue, this claim is without merit.

Second, Appellants claim that the circuit court did not address their arguments relevant to the no direct tipping provision of §111.35(C) as a violation of the right to liberty and the right to freedom of speech. However, the circuit court did address these arguments and concluded that they "have been found to meet the *O'Brien* test when challenged under the First Amendment." As to Appellants' challenges under the liberty provisions, the circuit court did address this, stating that "[t]he tip jar is a permissible way for the semi-nude dancers to receive compensation for their work because it is not direct (i.e., with nothing

intervening; in an uninterrupted course) but is circuitious (i.e., in a roundabout course)."[17] This certainly addresses Appellants' claim in their Supplemental Brief in Support of Motion for Temporary Injunction, wherein they maintain that

> [b]y effectively prohibiting entertainers from receiving remuneration from their customers for the constitutionally protected services which they provide, and by prohibiting patrons from giving dancers any such compensation, Metro has unquestionably deprived "pasties and G-string" entertainers of their right to liberty protected by Ky. Const. §§1 and 11.

Consequently, Appellants' arguments that the circuit court did not address these issues lack merit.

Third, Appellants contend that the circuit court did not address their arguments that the buffer zone as set forth in §111.35(B) violated the right to liberty. However, the circuit court held that this restriction was "aimed at curtailing the secondary effects associated with adult oriented businesses." This is sufficient to address Appellants' claim of a violation of the right to liberty. Individual rights may be restricted pursuant to police power. *See e.g., Deja Vu of Nashville*, 274 F.3d 377.

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[17] Although the circuit court did address this clause for vagueness, which Appellants contend they were not arguing, the import of the decision was that the performers could in fact receive compensation by patrons for their work. This was the crux of Appellants' argument and was addressed by the trial court.

Fourth, Appellants contend that the circuit court did not address their claim that the licensing scheme of Chapter 111 is unconstitutional because it does not maintain the status quo pending judicial determination. This argument lacks all merit as the circuit court did address the issue of maintaining the status quo during administrative proceedings and concluded that a temporary license is given to an applicant which stays in effect pending the administrative proceedings and judicial determination. Accordingly, we are satisfied that the circuit court addressed this issue.

Fifth, Appellants claim that the circuit court failed to address their claim that the licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof in court. Appellants are referencing the third prong of the constitutional test for a licensing scheme to provide adequate and prompt judicial review of any alleged government restraint of expression as set forth in *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S. Ct. 734, 739, 13 L. Ed. 2d 649 (1965). Contrary to Appellants' argument, the circuit court's opinion sufficiently addresses this issue. The circuit court found that the ordinance contained "neutral and nondiscretionary criteria for the issuance of a license." The protection under the third prong in *Freedman* applies only when the prior restraint system requires a public official to pass judgment on the content of the speech. *Deja Vu of Kentucky, Inc. v. Lexington-Fayette Urban County Gov't*, 194 F. Supp.2d 606, 614 (E.D. Ky. 2002) (citing *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 890 (6th Cir. 2000) (citing *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224, *reh'g*

denied (6th Cir. 1995), *cert. denied*, 516 U.S. 909, 116 S. Ct. 277, 133 L. Ed. 2d 198 (1995))).

The circuit court concluded that the "licensing scheme in the Ordinance contains the proper judicial review mechanisms and procedural safeguards necessary to satisfy First Amendment requirements." This review included whether, in issuing a license, the licensor was engaged in reviewing the content of the conduct or using objective criteria; i.e., whether the licensing review was based on content-neutral or content-based criteria. Thus, having determined that the Ordinance is content neutral, there was no error by the circuit court in not addressing the third *Freedman* prong.

Appellants contend that the circuit court did not adjudicate whether Metro can implement a buffer zone requirement and "no tip" provision because Chapter 111 already prohibits both full nudity and "topless" entertainment. Appellants assert that these restrictions have been recognized by the court as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Throughout its opinion, the circuit court addresses these issues and finds that they meet the *O'Brien* test and constitutional scrutiny. Simply because the circuit court did not put the language exactly as Appellants wanted, this does not mean the circuit court did not address the issue.

Finally, Appellants argue that Metro cannot engraft a dancer buffer zone and "no tip" provision because Chapter 111 also prohibits nudity. Our Court has previously upheld similar restrictions. *See e.g.*,

Restaurant Ventures, 60 S.W.3d 572. Thus, we find no error.

H. SECONDARY EFFECTS

Appellants claim that the circuit court erred when it failed to allow them to factually litigate their challenges to Metro's claims of harmful secondary effects of sexually oriented businesses. Appellants further contend that the circuit court "***'cleansed' the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***" (Appellants' brief at p. 45).

Metro wholly disagrees with Appellants' characterization of what actually took place at the circuit court level. A review of the circuit court record clarifies this issue.

The record in the matter is voluminous, with the parties, as well as *amicus curiae*, filing literally hundreds of pages of briefing. In Metro's "Composite Reply in Support of Motion for Summary Judgment and Motion to Dismiss in Opposition to Plaintiff's (sic) Motion for Temporary Injunction" filed on September 10, 2004, which apparently should have been the last brief filed in the matter prior to disposition of the case before the circuit court, Metro attached voluminous exhibits and affidavits. Appellants moved to strike this brief alleging that Metro was attempting to "sandbag" them by presenting new arguments and evidence in a reply brief. Ironically, however, in Appellants' "Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order" filed on August 4, 2004, *before* Metro's

composite reply was filed, Appellants filed exhibits in support of Appellants' Supplemental Brief that went straight to the heart of attacking Metro's secondary effects foundation for Chapter 111. Included in the exhibits submitted by Appellants were:

(A) Findings of Fact, Conclusions of Law, and Order in Kentucky Restaurant Concepts, Inc. v. Louisville/Jefferson County Metro Government, Case No. 02-CI-06086;

(B) *Pap's A.M. v. City of Erie*, 812 A.2d 592 (Pa. 2002);

(C) Affidavit of Dr. Daniel Linz, whose areas of concentration include the effects of sexually-related expression and secondary effects "studies" and information. Dr. Link was hired by Appellants to review the information relied upon by Metro as the basis for its secondary effects concerns.

(D)(1) Dr. Linz's Curriculum Vitae;

(D)(2) An article, authored in part by Dr. Linz, entitled "Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinance: Debunking the Legal Myth of Negative Secondary Effects."

(E) An article entitled "Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology" The unpublished case of *Lee v. City of Newport*, 947

F.2d 945, 1991 WL 227750 (6th Cir. Nov. 5, 1991).

(F) The affidavit of Brian Franson, the Area Director of Kentucky Restaurant Concepts, Inc.

(G)(1) A diagram of Appellant PT's floor plan.

(G)(2) A diagram of Appellant PT's, illustrating the six-foot distance restriction.

(H) The affidavit of Robert Hollis, manager of Appellant Blue Movies, LLC.

Moreover, in contravention of CR 76.28, as it stood at that time, Appellants filed a Motion for Leave to File Second Supplemental Brief on August 19, 2004, for the purpose of informing the circuit court that on August 6, 2004, this Court issued its decision in *Jameson v. Commonwealth,* (No. 2003-CA-00967-DG) (Ky. App. August 6, 2004). Relying on this Court's opinion in *Jameson*, Appellants argued that it set forth the constitutional standard to employ in determining whether an ordinance which regulates adult entertainment is constitutional, specifically as to the evidentiary basis for a local government to rely upon for secondary effects. Attached to Appellants' supplemental motion were several exhibits "designed to illustrate to [the circuit court] the type of evidence that Plaintiffs will be able to place before the Court at trial to establish that Metro did not have a sufficient "secondary effects" justification for enacting Chapter 111." These exhibits included:

(A) *Jameson v. Commonwealth*, Slip Opinion No. 2003-CA-000967, which dealt heavily with

the evidence necessary to defeat a governmental entity's claim of legislation necessary to defeat secondary effects of adult entertainment businesses;[18]

(B) The transcript of Volume 3 of the preliminary injunction hearing in *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, Case No. 3:01-CV-374-H, which included testimonial evidence and record evidence in that matter regarding whether the alleged secondary effects that Metro sought to curb by enacting were substantiated;

(B)(1) The resume of Michael Ober, an investigator hired by Appellants;

(B)(2) A document entitled "Police Service Calls for Local Bars and Cabarets" for Louisville, Kentucky from January 1998 to the present;

(C) The transcript of Volume 1 of the preliminary injunction hearing in *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, Case No. 3:01-CV-374-H, which included testimonial evidence and record evidence in that matter regarding whether the alleged secondary effects that Metro sought to curb by enacting the amendments to Chapter 111 were substantiated;

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[18] At the time this was filed, CR 76.28 did not allow the citation to non-final opinions.

(C)(1) The Curriculum Vitae of Rebakah J. Thomas, Ph.D, who was hired by Appellants to testify at the preliminary hearing in *Kentucky Restaurants Concepts*; she had reviewed and reported on the secondary effects involving disease transmission in adult use establishments in the State of Florida;

(C)(2) A report written by Dr. Thomas titled "The Effect of Adult Use Entertainment Activities on Transmission of Disease."

On August 24, 2004, the circuit court granted Appellants' motion to file the supplemental brief, which included the exhibits regarding secondary effects. Thereafter, Metro filed its Composite Reply on October 10, 2004, going to great lengths to address the issues raised by Appellants' references to our Court's opinion in *Jameson* and to the exhibits submitted by Appellants in both their supplemental brief and second supplemental brief referencing secondary effects.

Despite Appellants' having filed exhibits going to the heart of a secondary effects argument in both their supplemental brief and motion to file second supplemental brief, Appellants filed a motion on September 23, 2004, to strike Metro's composite reply arguing Metro had presented new arguments and affidavits in a reply brief. In the alternative, the Appellants requested that they should be permitted to complete depositions of Metro's affiants and be given additional time to file a sur-reply with any necessary counter-affidavits.

In ruling on Appellants' motion to strike on September 28, 2004, the circuit court held that:

> [h]aving given due consideration to the arguments of the parties and the circumstances of this case, the Court declines to strike Metro Government's composite reply, but it will allow Plaintiffs to file a sur-reply on or before November 5, 2004. At that time, the matter will be taken under submission by the Court, without any further briefs being filed unless leave by Court . . .[19]

Because the circuit court's ruling created confusion regarding scheduling dates, both parties filed motions for clarification. Additionally, Metro moved for the circuit court to vacate its order allowing a sur-reply by Appellants. The foundation for this motion was Metro's argument that Appellants' motion to strike was "spurious and belied by the fact the issue [was] discussed or mentioned 27 times in Metro Government's initial summary judgment memorandum."

The circuit court ruled on the parties' motions, entering an order on October 13, 2004, and amending it on October 19, 2004. Contrary to Appellants' characterization that the circuit court "***'cleansed' the record in order to insure that this factual issue would not be ripe for consideration in the pending motions***" (Appellants' brief at p. 45), in its amended order, the circuit court ruled that

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[19] For clarification purposes, it appears that the circuit court record contains an error in the chronological filings of Appellants' motion to strike and the circuit court's order ruling on that motion. The order, entered on September 28, 2004, was filed in the record *before* Appellants' motion to strike, which was entered on September 23, 2004.

> [t]his matter came before the Court on Plaintiff's Motion to Strike the pleading of Metro Government filed on September 10, 2004, titled Metro's Composite Reply in Support of Motion for Summary Judgment and Motion to Dissolve in Opposition to Plaintiff's (sic) Motion for Temporary Injunction. After discussion, *it was agreed by all parties that this pleading would be stricken from the record along with the Plaintiff's* (sic) *Exhibits in Support of Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order, filed on August 4, 2004.*
>
> It is further ORDERED by the Court that Metro Government is to file a new Reply which eliminates references to the secondary affidavits filed in the stricken Reply and the Plaintiffs *may file a new Exhibits* (sic) *in Support without the affidavits in Exhibit C of the stricken Report.*
>
> The Reply and Exhibits are to be filed no later than the close of business on October 18, 2004 (sic) and this matter will stand submitted on October 19, 2004.

(Emphasis added).

Neither party filed any motions to vacate this order. Rather, they both filed their respective briefs in a timely manner. Although Appellants had been given additional time for discovery and were permitted to file additional exhibits supporting their claims, they did not file any additional record evidence referencing

secondary effects. Nonetheless, in their "Re-Filed Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary Restraining Order," they referenced the nature of secondary effects numerous times. Significantly, in footnote 9 of their Supplemental Brief, Appellants contend that

> [i]f [the circuit court] is to adopt, however, the secondary effects doctrine as a legitimate basis upon which to justify constitutional legislation in regard to the rights afforded by Ky. Const. §§ 8 and 26, Plaintiffs suggest that the proper application of that doctrine should be that as is set forth in Justice Souter's partial concurrence and partial dissent in **Pap's II** (529 U.S. at 310-317), along with the dissent which he authored) (joined by three other Justices) in **Alameda Books**, ***535 U.S. at 453-466.***

(Appellants' Supplemental Brief filed on October 18, 2004 at p. 18, n. 9) (emphasis in original). And in its redacted composite reply, Metro heavily relied on secondary effects to support the basis for the enactment of Chapter 111. Specifically, it stated that "this record demonstrates that Metro relies upon evidence 'reasonably believed to be relevant' to the problems of secondary effects associated with sexually oriented businesses."

From any vantage point, the record bears out that the issue of secondary effects was fully before the circuit court. Moreover, the circuit court went out of its way to give Appellants the opportunity to rebut Metro's claims of secondary effects. Appellants cannot now be heard to complain because it entered into an

agreement with Metro to strike their respective "expert" affidavits on secondary effects from the record. Nothing in the circuit court's October 19, 2004 order dictates that the issue of secondary effects would not be reviewed, only that it would honor the parties' agreement that they would remove their respective expert affidavits from the record but would allow additional discovery and evidence on the issue. Contrary to Appellants' present argument, the issue of secondary effects permeates the parties' briefing. Accordingly, the Court concludes that the parties were afforded an opportunity, and actually did, litigate the issue of secondary effects. Therefore, we reject Appellants' argument that the circuit court erred in ruling on this matter.

Furthermore, the case law squarely supports the trial court's assessment that "[c]ombating secondary effects associated with adult-oriented entertainment is an important governmental interest, which is unrelated to the suppression of free expression." Recently, the Kentucky Supreme Court, in a thorough review of case law defining sexually oriented businesses, decided specifically the issue of the evidentiary burden of secondary effects in *Jameson*, 215 S.W.3d 9. In *Jameson*, the Court decided that to shift the burden to the government, a party would have to

> present "actual and convincing evidence" sufficient to cast "direct doubt" on the fiscal court's rationale or findings or that the secondary effects generally associated with sexually oriented businesses are merely a pre-textual justification for the suppression of protected expression. Merely presenting

> evidence showing a lack of some *local* secondary effects is insufficient to override the fiscal court's rationale and findings.

Id. at 34. Furthermore,

> [t]o cast direct doubt, the challenger must present evidence that is *directly contrary* to the municipality's evidence, not simply produce a general study refuting all secondary effects. This is not a new or heightened evidentiary standard as this interpretation is consistent with the holding in *Renton*, which established the proper evidentiary burden on the parties.

Id. at 36 (quoting *City of Elko v. Abed*, 677 N.W.2d 455, 465 (Minn. App. 2004)).

Furthermore, in *Jameson*, the Court noted

> that *Alameda Books* does not require [it] to re-weigh the evidence relied upon by the fiscal court, "nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed."

Id., 215 S.W.3d at 35 (quoting *G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 639-40 (7th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 451, 122 S. Ct. at 1743, 152 L. Ed. 2d 670 (Kennedy, J. concurring))). Accordingly, "substantial deference is afforded local officials in their assessments and

inferences of solutions to problems within their city." *Id.* (citing *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1199 (10th Cir. 2003)).

Local governments "may rely upon any evidence 'reasonably believed to be relevant' for demonstrating that completely nude dancing contributes to the deterioration of residential and commercial neighborhoods." *Jameson*, 215 S.W.3d at 30 (quoting *Alameda Books*, 535 U.S. at 438, 122 S. Ct. at 1736, 152 L. Ed. 2d 670; *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931, 89 L. Ed. 2d 29). "This includes, but is not limited to, the experiences of, and studies produced by, other cities, as well as 'detailed findings' in judicial opinions." *Id.* (citing *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265; *City of Renton*, 475 U.S. at 50-51, 106 S. Ct. at 930-31, 89 L. Ed. 2d 29). "However, '[t]he municipality's evidence must *fairly* support the municipality's rationale for its ordinance.'" *Id.* (citing *Alameda Books*, 535 U.S. at 438, 122 S. Ct. at 1736, 152 L. Ed. 2d 670) (emphasis added in *Jameson*). "'Even in cases addressing regulations that strike closer to the core of the First Amendment values, [the Court has] accepted a state or local government's *reasonable belief* that the experience of other jurisdictions is relevant to the problem it is addressing.'" *Id.*, 215 S.W.3d at 31 (quoting *Pap's A.M.*, 529 U.S. at 297, 120 S. Ct. at 1395, 146 L. Ed. 2d 265) (emphasis added in *Jameson*).

The burden on Metro is admittedly low. *Id.* "[A local government] could rely on *any* evidence, short of 'shoddy data,' that the [local government] 'reasonably believed to be relevant' for establishing a link between the regulation and a substantial government interest." *Id.* (quoting *Alameda Books*, 535 U.S. at 438, 122 S.

Ct. at 1736, 152 L. Ed. 2d 670) (citing *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29; *Barnes*, 501 U.S. at 584, 111 S. Ct. at 2469, 115 L. Ed. 2d 504) (emphasis added in *Jameson*).

The Court in *Jameson* also took note that the United States Supreme Court "has explicitly rejected the requirement that a municipality show, by empirical data, that its ordinance will successfully, 'cure' the secondary effects attributed to the establishments at issue in this case." *Id.* The Court reasoned that "'[s]uch a requirement would go too far in undermining our settled position that municipalities must be given a "reasonable opportunity to experiment with solutions" to address the secondary effects of protected speech.'" *Id.*, 215 S.W.3d at 31-32 (quoting *Alameda Books*, 525 U.S. at 439, 122 S. Ct. at 1736, 152 L. Ed. 2d 670) (quoting *Young*, 427 U.S. at 71, 96 S. Ct. at 2453, 49 L. Ed. 2d 310); (citing *Pap's A.M.*, 529 U.S. at 300, 120 S. Ct. at 1397, 146 L. Ed. 2d 265 (addressing Justice Souter's dissent, wherein he would require empirical analysis, and recognizing that this idea has been "flatly rejected")); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394, 120 S. Ct. 897, 908, 145 L. Ed. 2d 886 (2000) (noting that the "invocation of academic studies said to indicate" that certain threatened harms were not real was insufficient to cast doubt on the experience of local government).

> [I]t is irrelevant whether the local government is actually wrong regarding the extent of all the secondary effects that have actually occurred or may occur in the future when considering its decision to regulate the sexually oriented business. Rather the emphasis is on whether

> the decision to regulate is merely a pre-text to suppress the freedom of expression. And, of course, evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation. But, such evidence must rise to the level of casting "direct doubt" on the county's evidence supporting that reasonable belief, including whether the county's interest is, indeed, substantial.

Id., 215 S.W.3d at 32.

In light of *Jameson*, the law in Kentucky is that local governments are not required to conduct their own studies to justify local ordinances. *Id.*, 215 S.W.3d at 33 (citing *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004)). They may rely on studies of other localities, experiences of other governments and even judicial decisions in determining the need for regulating the secondary effects associated with the adult entertainment business.

Nonetheless, even if Appellants had set forth sufficient evidence casting direct doubt as to Metro's rationale for the ordinance, such doubt would have been rebutted by evidence set forth by Metro of actual adverse effects in the Metro area resulting from adult entertainment businesses. Although not required to submit reports evidencing secondary effects in its own locality, Metro included in the record a substantial number of police citations for prostitution, drugs and disorderly conduct issued at seven different adult entertainment businesses in the Metro area. For

example, on October 30, 2003, seven prostitution violations alone were issued at Appellant Thoroughbred II's location at 4744 Poplar Level Road. It is this type of behavior that Metro unequivocally stated the Ordinance was enacted to deter.

Metro set out in the preamble of the Ordinance that "it had been the experience of other communities, as well as [Metro]" that adult entertainment facilities adversely affected nearby properties. It relied on judicial opinions, media reports, land use studies, and crime impact reports. It also relied on repeated judicial findings validating municipalities' reasonable reliance on the secondary effects evidence to support time, place and manner regulations of sexually oriented businesses. Metro additionally cited to reports concerning secondary effects in and around numerous cities spanning over twenty years. Metro unequivocally stated that its purpose was to curb secondary effects associated with adult entertainment businesses and provided the evidentiary basis for this need to satisfy the *Jameson* standard. Consequently, we conclude that the stated reasons articulated by Metro were not pretextual as a prior restraint on free expression, but rather an effort, in accord with the well-established law, to curb the secondary effects associated with adult entertainment establishments. Thus, there was no error by the trial court.

I. SEVERABILITY

Relying on their argument that the licensing fees are unconstitutional, Appellants contend the infirmity of the licensing provisions renders the entire Ordinance invalid. "The Supreme Court has held that invalid portions of a statute should be severed unless

it is clear that the Legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not." *Plain Dealer Publ'g Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986), *aff'd in part and remanded*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 931-32, 103 S. Ct. 2764, 2774, 77 L. Ed. 2d 317 (1983)).

However, we need not address the severability issue because our previous determination that the licensing fees are not unconstitutional negates the core of Appellants' argument. Nonetheless, as Metro correctly cites in its brief, Section 111.98, which specifically addresses the issue of severability, also refutes Appellants' argument. It states each section and provision of Chapter 111 is to be independent of all other provisions and sections. Specifically, as to license applications, the section states "should any license procedure in this ordinance be deemed invalid, the substantive regulations and restrictions contained herein shall not be affected thereby." Accordingly, Appellants' severability argument is without merit.

Having reviewed the arguments presented by Appellants on appeal, we find no error. Therefore, we affirm the circuit court's decision on each of the above issues.

IV. QUESTIONS ON CROSS-APPEAL

Metro brings a cross appeal challenging the trial court's invalidation of two provisions: (1) the required disclosure of principal owners of sexually oriented business and (2) the prohibition on physical contact

between erotic dancers, while they are not performing, and patrons.

A. DISCLOSURE OF SHAREHOLDERS

Pursuant to §111.36(B)(2)(b), the application for a license requires that

> [i]f the applicant is other than an individual, such as a corporation or partnership, each officer, director, general partner, principal owner and each other person who will participate directly in decisions relating to management of the business shall sign the application for a license as the applicant and comply with the requirements of this section.

Pursuant to §111.02 of the ordinance, a principal owner is

> [a]ny person owning, directly or beneficially, twenty percent (20%) of a corporation's equity securities, 20% or more of the membership interests in a limited liability company, or, in the case of any other legal entity, 20% or more of the ownership interests in the entity. Applications for adult entertainment licenses must contain the name, address, date of birth, and a copy of a government-issued photo identification card or a set of fingerprints of all principal owners, if the applicant is one or more individuals.

The trial court recognized that local governments have a legitimate interest in identifying those persons who have direct legal responsibility for the business

operations of an adult oriented business. However, it determined that the requirement of the disclosure of a twenty-percent shareholder did not meet the fourth prong of *O'Brien*, reasoning that this disclosure did not comport with local governmental interest in identifying those persons who have a direct legal responsibility for the business operations of an adult oriented establishment. Relying on *East Brooks Books*, 48 F.3d 220, the trial court held that "[a] twenty percent or less shareholder would normally have little, if any, responsibility for the everyday operation of the business, and twenty percent is generally not a controlling or significant share in the business."[20] On this basis, the trial court determined that the disclosure requirement was impermissibly broad.

We are troubled by the trial court's analysis of this issue on several grounds. First, under *East Brooks Books*, the shareholder disclosure requirement was that *any* shareholder, regardless of the amount of shares owned, was required to be disclosed.

But, second, and more importantly, we do not believe the trial court made a proper evaluation under *O'Brien's* fourth prong: whether the incidental restriction on alleged free speech or expression is no greater than essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d 672. Following *O'Brien,* we believe that it is error for any court to simply review the disclosure requirement based only on the percentage of holdings

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[20] Any reference to less than twenty percent is an inaccurate statement of the Ordinance. Shareholders with less than twenty percent are not required to be named on the application.

a shareholder may have without also reviewing the purpose for which the provision was enacted.

For example, in *East Brooks Books*, an applicant would not have been issued a permit to operate if he or she "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." 48 F.3d at 223 (citing Memphis Ordinance 4013 sec. 20-122(b)(1)). No other provisions of the ordinance are cited in the opinion in reference to applicants. Apparently relying on this provision of the ordinance, the Sixth Circuit concluded that "the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business." *Id.*, 48 F. 3d at 226. Accordingly, section 20-122(b)(1) of the ordinance, requiring the naming of any shareholder whether they otherwise met the stated purpose for the provision, was not geared toward furthering the legitimate governmental purposes as stated in section 20-122(b)(1) in the ordinance. Thus, it was impermissibly broad.

Appellants rely heavily on *Ellwest*, 718 F. Supp. 1553. In *Ellwest*, the ordinance under review required disclosure of principal shareholders in the application for a license to operate a sexually oriented business. The prime objective of the ordinance in the *Ellwest* case was "to protect and enhance public health by reducing the spread of sexually-transmitted diseases and other diseases which could thrive and be transmitted in the conditions found to be prevalent in the majority of adult-oriented establishments . . . ." 718 F. Supp. at 1564. The Court determined that the

evidence was clear that the ordinance was "implemented to further an important and substantial government interest to protect and enhance public health by reducing the spread of diseases which thrive in the conditions created by the unregulated adult-oriented establishments." *Id.* The Court held that the required disclosure of principal shareholders would not further the stated purpose of the ordinance because shareholders are not ultimately responsible for the day-to-day operation of the business and therefore would have no control over the conditions at the adult establishments. *Id.*, 718 F. Supp. at 1565.

Appellants also point to *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). In that case, like *East Brook Books*, the disclosure requirement was a listing of all shareholders. The ordinance expressly provided that applicants would not be denied a license because of the identity of any of its shareholders. "Rather, '[t]he information will be used solely to identify and notify control persons of their responsibilities under [the licensing ordinance] and *to hold such persons legally responsible should any provisions of [the ordinance] be violated.*'" *Id.*, 887 F.2d at 225 (emphasis added in *Acorn Investments*). Accordingly, the purpose of the disclosure provision was to identify the real persons in control of the corporation or the policy makers. *Id.*, 887 F.2d at 225-226. The Court held, however, that officers and directors, not shareholders, were legally responsible for the management of a corporation's business. Consequently, the Court "fail[ed] to see how the City's interest in accountability [was] served by notifying shareholders [of violations of the ordinance]. If [the adult businesses] fail[ed] to comply with the ordinance, the City [was] free to take appropriate enforcement

action against the corporation and its officers and directors." *Id.*, 887 F.2d at 226. Accordingly, the Court held that "there is no logical connection between the City's legitimate interest in compliance with the . . . ordinance and the rule requiring disclosure of the names of shareholders." *Id.*, 887 F.2d at 226.

In *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), the ordinance under review was aimed at scatter zoning. However, requiring owner information would not further this purpose. Therefore, the Court held the requirement invalid.

From the foregoing, it can first easily be discerned that the disclosure requirement cannot be aimed at *de minimis* owners. *See East Brook Books,* 48 F.3d 220. But, second, the required disclosure must further the stated governmental interest, namely that it meet the *O'Brien* test. The stated purpose in the Ordinance presently under review for the necessity of owners' information concerns issues of "extensive" involvement by "organized crime" in the adult entertainment industry. The case of *Envy, Ltd. v. City of Louisville*, 734 F. Supp. 785 (W.D. Ky. 1990), cited by Metro, provides support for this concern. In *Envy, Ltd.*, the City of Louisville found extensive involvement of organized crime in adult entertainment activities, which necessitated the disclosure of the true owners of these establishments to aid in the enforcement of criminal laws, public and safety regulations. *Id.*, 734 F. Supp. at 790.

With these considerations as our background, we cannot say that the disclosure provision is overly broad. Metro has stated a legitimate governmental concern under its police power: monetary backing for

adult entertainment businesses tied to organized crime. The cases relied upon by the trial court and those cited by Appellants do not include this legitimate government concern. Therefore, disclosure of the principal owners will further Metro's legitimate interest without unduly burdening free expression. While compelled disclosure of owner information may chill expression, as was the trial court's concern, so long as the disclosure furthers a countervailing governmental interest that is substantial, the disclosure requirement may be valid. *See generally Buckley*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659. This requires a "relevant correlation" or "substantial relation" between the information required and the government interest but does not require an exact fit. *Id.* Because Metro has set the floor of disclosure at twenty percent, which is not *de minimis* when combined with Metro's stated governmental interest for the disclosure, we conclude there exists a substantial relation to the stated governmental interest. Thus, the disclosure requirement is valid, and we reverse the trial court on this issue.

B. PROHIBITION ON TOUCHING BETWEEN DANCERS AND PATRONS

Section 111.35(D) provides that "[i]t shall be a violation of this chapter for any employee, who regularly appears semi-nude in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer. The circuit court held this provision was invalid on two grounds: (1) it is overbroad in that its reach prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the

time; and (2) it is not limited to touching on the premises of an adult entertainment establishment and could be read to prohibit a dancer from touching anyone, off premises, who happens to be a customer. The circuit court concluded that "[c]arrying this to its full extent would lead to the absurd result that a dancer could not touch someone like a husband, boyfriend, or relative if that person is also a customer of the adult entertainment establishment." Based on these reasons, the circuit court found the provision overbroad. Nonetheless, the circuit court upheld, as it should, provisions of Metro's ordinance that buffer zones and no direct tipping prohibitions that are aimed at curtailing the secondary effects associated with adult businesses.

We will first address the second reason for striking the provision. The circuit court is correct that the provision at issue does not specify that it governs entertainers and patrons only while inside an adult entertainment establishment. According to this reasoning, an entertainer could be subject to penalties and charges if she touches a patron outside of the premises of the adult entertainment business. Thus, the circuit court found the provision to be overbroad.

Regarding the overbreadth doctrine, however, "'[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld.'" *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 683 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 645 (1988)) (citations omitted in *Kentucky Restaurant Concepts*). Certainly, the language of Section 111.35(D) *may* broadly be read

as applying to contact occurring outside the premises of an adult entertainment establishment. However, to do so requires an interpretation "entirely inconsistent with the obvious purpose of the Ordinance . . . ." *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 683. "Given both the evident legislative intent and the actual text . . . the [trial court] should not contort the Ordinance 'to conjure up a hypothetical constitutional clash where none actually exists.'" *Id.* (quoting *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998)) (citations omitted in *Kentucky Restaurant Concepts*, 209 F. Supp. 2d at 683).

With this in mind, we do not believe that Section 111.35(D) can be read to apply to conduct outside the premises of adult entertainment businesses. A reading of the Ordinance evidences its intent is directed toward sexually oriented businesses, and no where does it mention conduct or actions taking place outside these businesses' premises. Accordingly, we reject the circuit court's analysis on this issue.

The other question is whether the Ordinance is constitutionally infirm in its prohibition of personal contact between entertainers and patrons at all times while they are inside their places of business. The circuit court correctly cited to the Sixth Circuit interpretation of *Barnes* "not to state that all similar activities are speech as a matter of law, but instead to leave open the possibility that, on a different record, some activities may be considered not to be expressive at all," *DLS*, 107 F.3d at 409, but nonetheless struck the provision.

Numerous courts have held that a no-touch provision is not constitutionally infirm because there

is no constitutionally expressive conduct involved. *See e.g.*, *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253-55 (5th Cir. 1995) (holding "no touch" provision not overbroad and does not burden more protected expression than necessary); *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 338 (Tenn. Ct. App. 2000); *2300, Inc. v. City of Arlington*, 888 S.W.2d 123, 129 (Tex. Ct. App. 1994) (upholding "no touching" provision). We agree with these courts that touching between a performer and a customer is not protected expression. Simply because United States Supreme Court case law has thrust upon us a mandate that erotic expression deserves at least minimal First Amendment protection, this does not mean that all activities taking place in such an environment are likewise protected. Because (1) performers have no constitutional right to touch patrons, (2) patrons have no constitutional right to touch performers, and (3) government can pass legislation designed to reduce the negative secondary effects of sexually oriented businesses, we disagree with the circuit court that the no-touch provision is overbroad.

In conclusion, we find no error by the circuit court on the issues on which Appellants appeal; thus, we affirm. As to the cross-appeal brought by Metro, we find both provisions to be constitutionally sound and hereby reverse the circuit court on these issues. As mentioned earlier, we believe we are bound by the interpretation of the federal Constitution, which is the floor for the level of protection given to free expression and free speech, to conclude that the conduct at issue is entitled to some level of protection, but this type of conduct only exists at the outer most boundary of freedom of expression and speech. Without the

mandate by federal jurisprudence that we grant such protection, meaning that Kentucky's Constitution can give no lesser protection to this form of alleged expression, it is not evident that Kentucky would grant any protection at all to erotic expression if we had the choice.

We are keenly aware that many have relied on freedom of expression to condone behavior that would not be otherwise constitutionally protected. We find enlightening the language in *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972, 974 (1942) wherein the high Court of Kentucky, in ruling on a freedom of religion issue, quoted *Jones v. City of Opelika*, 316 U.S. 584, 593, 62 S. Ct. 1231, 1237, 86 L. Ed. 1691 (1942) *rev'd on other grounds on reh'g, Jones v. City of Opelika*, 319 U.S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1943), as follows:

> They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to insure orderly living without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to

> adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.

And taking this line of reasoning one step further, we agree with the Court in *Ladd v. Commonwealth*, 313 Ky. 754, 761, 233 S.W.2d 517, 521 (1950), holding that when an individual is engaged in a right protected wherein he seeks to receive a fee or make a monetary profit, it "becomes a matter for proper regulation by the state." For the reasons as analyzed, we conclude the Ordinance at issue to be constitutionally sound.

HOWARD, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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APPENDIX C

JEFFERSON CIRCUIT COURT
DIVISION SIX

NO. 04-CI-01967

[Filed December 14, 2004]

KENTUCKY RESTAURANT CONCEPTS, INC. d/b/a P.T.'s Show Club, et al.	)
PLAINTIFFS	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
DEFENDANT	)

* * * * * * * * * * * * * * *

OPINION AND ORDER

This matter comes before the Court on a motion brought by Plaintiffs to enter a temporary injunction and on a motion brought by Defendant, Louisville/Jefferson County Metro Government ("Metro Government"), for summary judgment.

BACKGROUND SUMMARY

On February 26, 2004, Metro Government enacted Ordinance No. 21, Series 2004, amending Chapter 111 of the Metro Government Code of Ordinances, relating to adult entertainment. Said ordinance was signed into law by Mayor Jerry Abramson on March 1, 2004. On March 5, 2004, Kentucky Restaurant Concepts, Inc. d/b/a PT's and Blue Movies, Inc. filed this action challenging the Ordinance on constitutional grounds and seeking injunctive relief. Other adult entertainment businesses have since intervened in this action as additional plaintiffs.

After a hearing on March 5, 2004, the Court entered a restraining order enjoining Metro Government from the enforcement of the newly amended portions of the Ordinance. The case was removed to federal court by Metro Government, but was ultimately remanded back to this Court

On June 9, 2004, Metro Government filed a motion for summary judgment and a motion to dissolve the temporary restraining order. Plaintiffs filed a response to Metro Government's motions on August 4, 2004. On August 24, 2004, Plaintiffs were given leave to file a supplemental response. On September 10, 2004, Metro Government filed a composite reply. Plaintiffs objected to this reply and its "secondary effects" affidavits. Pursuant to the Court's October 13, 2004 order, Metro Government's composite reply was stricken from the record along with Plaintiffs' exhibits in support of their supplemental response. Metro Government filed a new reply on October 18, 2004, and Plaintiffs re-filed their supplemental response with new supporting exhibits on the same date.

OPINION

I. Standard of Review.

Metro Government is seeking summary judgment arguing that Chapter 111 of the Ordinance is constitutional in its entirety and thus, Plaintiffs cannot meet the standard for injunctive relief. Summary judgment is proper to terminate litigation when, as a matter of law, it appears that it would be impossible for the non-moving party to produce evidence at trial warranting a judgment in his/her favor. Steelvest Inc. v. Scansteel Service Center Inc., Ky., 807 S.W.2d 476 (1991).

Plaintiffs, who have been previously granted a restraining order, are seeking a temporary injunction. CR 65.04 provides for temporary injunctive relief during the pendency of an action. A temporary injunction is within the sound discretion of the trial court. Cyprus Mountain Coal Corporation v. Brewer, Ky., 828 S.W.2d 642 (1992). "A three-part test exists in determining whether to issue a temporary injunction." Sturgeon Mining Company v. Whymore Coal Company, Ky., 892 S.W.2d 591 (1995).

The first prong of the test is a showing of irreparable injury pending final judgment and is mandatory under CR 65.04. Id. at 592. An irreparable injury is one where "there exists no certain pecuniary standard for the measurement of damages." Cyprus Mountain Coal Company, 828 S.W.2d at 645. As held in Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), infringement upon First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury for purposes of

obtaining temporary injunctive relief. Erotic nude or semi-nude dancing has been considered to be a form of expression which enjoys at least marginal protection under the First Amendment. See Barnes v Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government, Ky. App., 60 S.W.3d 572 (2001). Protection under the Kentucky Constitution is no greater than but is co-extensive with the First Amendment to the United States Constitution. McDonald v. Ethics Committee of the Kentucky Judiciary, Ky., 3 S.W.3d 740 (1999). Consequently, both federal and state precedent is applicable.

The second prong of the test for injunctive relief is the weighing of the equities involved. Sturgeon Mining Company, 892 S.W.2d at 592. In doing so, the harm to Metro Government and the general public along with whether the injunction will merely preserve the status quo must be addressed. Maupin v. Stansbury, Ky., 575 S.W.2d 695 (1978). The harm to Metro Government and the public would be a delay in the enforcement of the Ordinance's new restrictions, which were adopted per the Ordinance's declaration of public policy and purpose to reduce the negative secondary effects associated with adult-oriented entertainment. However, there are members of the same public who seek the entertainment and merchandise offered by Plaintiffs, who are lawful businesses. Given the restraining order currently in place, a temporary injunction would preserve the status quo.

The third prong requires that a substantial question as to the merits be at issue. Sturgeon Mining Company, 892 S.W.2d. at 592. The Ordinance is

challenged on numerous constitutional grounds by Plaintiffs. After reviewing the relevant case law, the Court finds that the standard of review required to determine the state and federal constitutionality of the Ordinance, given its underlying stated justification to decrease secondary effects and not speech, is the test set forth in United States v. O'Brien, 391 US. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968);

> A government regulation is sufficiently justified if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct 1382, 146 L.Ed.2d 265 (2000) (plurality opinion).

The Ordinance's ban on total nudity (§ 111.35(A)) and its allowance of only semi-nudity (i.e., the requirement of a female dancer to wear pasties and a G-string), meets the four O'Brien factors. Regulation of the public health and safety are within the government's power. Combating secondary effects associated with adult-oriented entertainment is an important governmental interest, which is unrelated to the suppression of free expression. Any muting of a dancer's erotic message resulting from having to wear pasties and a G-string is *de minimis* and does not unconstitutionally abridge expression. See Restaurant Ventures, LLC, 60 S.W.3d at 578-79. Thus, the

Ordinance withstands Plaintiffs' constitutional challenge to its ban on total nudity.

II. Licensing Process

Next, the Court will address Plaintiffs' arguments concerning the constitutionality of the licencing process established under the Ordinance.

A. Licensing provisions - § 111.36 et seq.

Plaintiffs argue that the Ordinance lacks the requisite procedural safeguards. Specifically, they argue that the Ordinance fails to provide prompt judicial review of adverse licensing decisions. Metro Government cites to the recent case of City of Littleton v. Z.J. Gifts D-4, LLC, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), wherein the Supreme Court held that a state's ordinary judicial review procedure provided adequate tools for the courts to rule in a prompt manner to avoid delay-related First Amendment harm, where the adult business licensing scheme involved neutral and nondiscretionary criteria and did not seek to censor content. As argued by Metro Government, the Ordinance at issue here involves neutral and nondiscretionary criteria for the issuance of a license (see § 111.38(A)(1) - (7)).

Upon a proper application being filed, a temporary license is issued and within twenty business days from receipt of the application, a license or written notice of intent to deny a license is issued to the applicant. An administrative hearing is provided to any party who has been denied a license (the temporary license remains in effect during administrative proceedings) or anyone who has had a license suspended or revoked.

The hearing must be held within ten business days of the party's response to the license denial, suspension, or revocation. A written decision is required within ten business days of the hearing, and the party has the right to file a judicial review of this administrative decision within fifteen business days of its finality. During any judicial review, a party is given a provisional license to continue operation during the appeal process. See § 111.43.

Plaintiffs argue, however, that judicial review of an administrative proceeding is not guaranteed but is discretionary with the court. Under Kentucky law, there is an inherent right of judicial review of an administrative action where constitutional rights are involved. American Beauty Home Corporation v. Louisville and Jefferson County Plannig & Zoning Commission, Ky., 379 S W 2d 450 (1964). Consequently, the Court finds that the licensing scheme in the Ordinance contains the proper judicial review mechanisms and procedural safeguards necessary to satisfy First Amendment requirements.

B. Licensing fee section- § 111.41.

Plaintiffs also challenge the annual $1000 00 fee for an adult entertainment license as being unconstitutional. While a government cannot charge for the privilege of exercising a constitutional right, the government may impose a licensing fee related to defraying the cost of administering the licensing scheme. See Cox v. New Hampshire, 312 U.S. 599, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995); Deja Vu of Nashville, Inc v Metro Government of Nashville, 274 F.3d 395 (6th Cir. 2001); and

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672 (W.D. Ky. 2002).

Metro Government argues that the annual licensing fee is constitutional in that the estimated annual processing, enforcement, and policing cost associated with the adult entertainment licenses far exceeds the estimated annual revenue expected from the license fees. To support its argument, Metro Government has included the affidavits of the Director of the Division of Inspections, Permits, and Licenses (William Schreck) and the Chief Investigator with the Metro Police Department, which estimated said costs. The Court finds that this is sufficient evidence to show that the $1000.00 fee is reasonably related to defraying the cost of administering the licensing scheme and is thus constitutional. Metro Government is not charging Plaintiffs for the privilege of exercising their First. Amendment rights.

C. Criminal disability section § 111.38 and suspension/revocation section § 111.43.

The criminal disability section of the Ordinance deals with the criminal backgrounds of owners and operators of adult entertainment establishments, whereas the suspension and revocation section deals with post-licensure sanctions for prohibited conduct occurring on the premises of a licensed adult entertainment establishment.

Plaintiffs challenge these sections on the basis that the government may not deny, suspend, or revoke a license to engage in future expressive activities because of prior criminal activity. As argued by Metro Government, Plaintiffs have failed to plead any facts

to show that they have standing to challenge the criminal disability provisions (i.e., no evidence that any owner or operator has been convicted of any of the specified crimes in § 111.02 within the relevant two or five-year period). See Associated Industries of Kentucky, 912 S.W.2d at 951.

Furthermore, criminal disability provisions similar to those at issue in this case have been upheld as constitutional under the First Amendment. See Deja Vu of Nashville, Inc., 274 F.3d at 391-93; Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 687-90. Plaintiffs' challenge to § 111.43 likewise fails. Plaintiffs argue that the criminal disability section of the Ordinance violates their constitutional due process rights by establishing an irrebuttable presumption. This argument was rejected in Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 690-91, which rejection this Court finds to be persuasive.

D. Administrative inspections - § 111.39.

The Ordinance provides for periodic inspections of the public areas of any adult entertainment establishment during business hours to verify compliance with the Ordinance. Plaintiffs argue that periodic inspections of such areas is an unconstitutional search and seizure because a sexually oriented business is not within the definition of a "closely regulated industry" as defined in York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). They contend that these periodic inspections impose an unconstitutional condition upon exercising their First Amendment rights.

Metro Government argues that no search or seizure takes place since Plaintiffs have no expectation of privacy in areas where the public is invited to enter during regular business hours. Furthermore, Metro Government contends that even if a "search and seizure" were implicated, the Ordinance satisfies the "closely regulated industry" exception to the warrant requirement as it is a narrowly tailored method of ensuring compliance with the Ordinance.

After reviewing the cases cited by Metro Government, (see Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) and Hendricks v. Commonwealth, Ky., 865 S. W.2d 332 (1993)) there is a substantial question as to whether or not Plaintiffs could even establish a reasonable expectation of privacy in the public areas of their adult oriented businesses during operating hours. Nonetheless, even assuming a reasonable expectation of privacy, the inspections are valid under the "closely regulated industry" exception to the warrant requirement. As stated in Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 691:

> The Supreme Court has recognized an exception to the warrant requirement when the target of the search is a "closely regulated" industry, but warrantless searches of even closely regulated businesses must be "carefully limited in time, place and scope." See New York v Burger, 482 U.S. 691, 700-03, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

The periodic inspections under the Ordinance are clearly limited in time, place, and scope, They can only be conducted in public areas, during business hours,

and for the purpose of ensuring compliance with the Ordinance.

Plaintiffs also challenge § 111 03 which allows the director of inspections, permits, and licenses to enact from time to time such rules and regulations deemed necessary for the orderly administration of the Ordinance. As argued by Metro Government, this issue is not ripe for adjudication because no such rules or regulations exist and none are contemplated per the affidavit of William Schreck. In addition, § 111.03 only allows for the adoption of procedures for the orderly internal administration of the Ordinance and does not allow the director to change or amend the requirements of the Ordinance for a license or for the suspension or revocation thereof.

E. Prohibition of minors- § 111.17.

Section 111.17 of the Ordinance prohibits a person under the age of eighteen years to be employed by or to enter an adult entertainment establishment. Plaintiffs argue that since dancers are now required to wear pasties and G-strings, which eradicates true live "adult" entertainment, barring minors from such premises violates their fundamental constitutional rights. Metro Government argues that Plaintiffs do not have standing to challenge § 111.17 on behalf of minors who are not before this Court, based upon the holding in Associated Industries of Kentucky, 912 S.W.2d at 951. The court agrees.

F. Disclosure of principal owners - § 111.36(B)(2)(b).

The Ordinance requires that an application for an adult entertainment license contain the name,

address, date of birth, and a copy of a government-issued photo identification card or a set of fingerprints of all principal owners, if the applicant is one or more individuals If the applicant is other than an individual such as a corporation or partnership, each officer, director, general partner, principal owner and each other person who will participate directly in decisions relating to the management of the business shall provide the above-listed information. A principal owner is defined under the Ordinance as "any person owning, directly or beneficially, twenty percent (20%) of a corporation's equity securities, 20% or more of the membership interests in a limited liability company, or, in the case of any other legal entity, 20% or more of the ownership interests in the entity." See § 111.02.

Plaintiffs argue that requiring disclosure of corporate shareholders owning only twenty percent of adult oriented businesses acts as a prior restraint – chilling the exercise of their First Amendment rights and is unconstitutional as a violation of their fundamental right to privacy.

As stated in Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 684, federal courts apply the O'Brien test to determine a disclosure provision's constitutionality. Courts recognize that local governments have a legitimate interest in identifying those persons who have direct legal responsibility for the business operations of an adult oriented establishment. Such disclosure requirements have had little problem meeting the first three prongs of the O'Brien test, but the fourth prong is a closer question (i.e., the burden on First Amendment freedoms is no greater than necessary to further local government's legitimate interest). Id. at 684.

A twenty percent or less shareholder would normally have little, if any, responsibility for the everyday operation of the business, and twenty percent is generally not a controlling or significant share in the business. See East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995). Given the possibility that such disclosure may chill protected expression, the Court finds that where the applicant is other than an individual such as a corporation or partnership, requiring the disclosure of principal owners who have only a twenty percent ownership interest in the entity does not survive the fourth prong of the O'Brien test, as it is impermissibly broad. Said requirement is thus invalid. Consequently, disclosure under § 111.36(B)(2)(b) of the Ordinance for legal entities other than individuals is limited to each officer, director, general partner, and each other person who will participate directly in decisions relating to the management of that adult entertainment business.

G. Prohibition of sale of alcoholic beverages - § 111.44.

Plaintiffs argue that the legislature has created a comprehensive scheme in KRS Chapters 241-244 to deal with the manufacture, sale, and distribution of alcoholic beverages, which preempts § 111.44 of the Ordinance. Metro Government argues that there is no preemption under state liquor laws because local governments may regulate adult oriented businesses by virtue of their classification, notwithstanding that the businesses are also liquor licensees.

KRS 82.082(1) (which applies to Metro Government per KRS 67C.101) allows a city to exercise, in

furtherance of a public purpose, any power and perform any function that is not in conflict with a constitutional provision or statute. A power or function is in conflict with a statute if it is expressly prohibited by the statute or there is a comprehensive scheme of legislation on the same general subject. KRS 82.082(2).

The parties agree that the Kentucky general assembly has enacted a comprehensive scheme of legislation, codified at KRS Chapter 241 through Chapter 244, regulating the manufacturing, sale, and distribution of alcoholic beverages. Kentucky Licensed Beverage Association v. Louisville-Jefferson County Metro Government, Ky., 127 S.W.3d 647 (2004). Metro Government argues, however, that the Kentucky Revised Statutes do not contain a comprehensive scheme of legislation "on the same general subject" of adult entertainment, which is a matter of local regulation under KRS 67.083(3)(z).

Plaintiffs point to 804 KAR 5:060, an administrative regulation adopted by the Alcohol Beverage Control Board concerning "lewd, immoral or obscene entertainment" on licensed premises selling alcoholic beverages. The Ordinance prohibits the sale and consumption of alcohol at adult entertainment venues where the dancers wear no more than pasties and G-strings.

As stated in City of Louisville v. Michael A. Woods, Inc., Ky. App., 883 S.W.2d 881 (1993), preemption by the state does not always create a conflict with a municipal ordinance on the same subject matter. "The mere fact that the state has made certain regulations does not prohibit local government from establishing additional requirements as long as there is no conflict

between them." Id. at 884. It is the general rule that a city, in the exercise of police power, may pass an ordinance that is in addition to, yet not inconsistent with, state statutes and constitutional provisions. Id. at 883.

Based upon the foregoing, the Court finds that § 111.44 of the Ordinance, which regulates adult entertainment establishments because of the sexual nature of the entertainment provided and not because of their liquor licenses, is not in conflict with or preempted by KRS Chapters 241 to 244.

III. Vagueness and Overbreadth.

Next, the Court will address Plaintiffs' various vagueness claims. Plaintiffs have basically asserted five vagueness claims which relate to that portion of § 111.02 which defines "adult entertainment establishment" to mean the regular commercial participation in one of nine defined activities including "commercial sexual entertainment center." Plaintiffs challenge this activity definition along with the phrase "regular commercial participation," and the terms "regularly," "principal use," "erotic touching" as used to define "sexual activities."

Metro Government argues that Plaintiffs lack standing to assert these challenges as to what activities will cause a business to be regulated as an adult entertainment establishment under § 111.02, since all Plaintiffs admittedly qualify as adult entertainment establishments under the Ordinance. To support its argument, Metro Government cites to the following language in Young v. American Mini

Theatres, Inc, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion):

> We find it unnecessary to consider the validity of either of [respondents' vagueness] arguments in the abstract. For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters propose to offer adult fare on a regular basis. Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents.

See also Associated Industries of Kentucky, 912 S.W.2d at 951.

The Court agrees that Plaintiffs lack standing to challenge under the vagueness doctrine what activities will cause a business to be regulated as an adult entertainment establishment under the Ordinance since Plaintiffs admittedly qualify as such establishments. Under the circumstances of this case, the Court finds that it would be improper for Plaintiffs to assert the rights of third parties not before the Court.

Plaintiffs also challenge the term "cleavage," as used in the phrase "the genitals, anus, anal cleft or cleavage, pubic area, vulva, and nipple and areola of the female breast" in the definition of "semi-nude or state of semi-nudity" in § 111.02, since it does not refer to a portion of the female breast. Metro Government

argues that cleft and cleavage both mean crack and clearly refer to the crack between the buttocks.

The void for vagueness doctrine encompasses the situation where a law is so vague that a person of ordinary intelligence cannot reasonably interpret what is prohibited. Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 682, citing Grayned v City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). As stated in Lexington Fayette County Food and Beverage Association v. Lexington-Fayette Urban County Government, Ky., 131 S.W.3d 745 (2004):

> As long as a ordinance or statue can be reasonably understood by those affected by the ordinance and they can reasonably understand what the statute requires of them, it is not unconstitutionally vague. [Citation omitted]. Vagueness involves a "man on the street" approach. The challenged statute [or ordinance] must provide 'fair warning" to the public and "explicit standards" for those who apply it in order to pass constitutional muster. [Citation omitted].

In the context of the language of the Ordinance (i.e., "anal cleft or cleavage"), the Court finds that the term "cleavage" is used as a synonym for the term "cleft" and is not unconstitutionally vague.

Plaintiffs are also challenging § 111.36 as vague, arguing that it cannot be reasonably understood who is required to file an application for an adult business. While the Court agrees with Plaintiffs that this section of the Ordinance could have been written so as to be more clear, § 111.36 when read as a whole is

reasonably understandable by people of common intelligence. If the adult entertainment establishment is owned by one or more individuals, all principal owners must file a joint application. If the establishment is not owned by one or more individuals but is owned by a corporation or partnership or like entity, each officer, director, general partner, and any other person who will directly participate in decisions relating to the management of the business must file a joint application. (The "principal owners" language in § 111.36(B)(2)(b) was previously found herein by the Court to be invalid).

Plaintiffs further challenge the sixty-day grace period in § 111.40(A) for vagueness. Said section provides that current licensees shall be subject to regulation by the terms of the ordinance and shall be in full compliance with the ordinance within sixty days after the effective date hereof. The Ordinance was signed into effect by the Mayor on March 1, 2004. Enforcement thereof was subsequently temporarily restrained on March 5, 2004. While Metro Government argues that the sixty-day grace period has run, the Court disagrees. The grace period is not running and could not reasonably run during the period while the temporary restraining order is in effect. The Court, however, does agree with Metro Government that there is nothing unconstitutionally vague about § 111.40(A) as written.

Plaintiffs also challenge the specific unlawful activities listed in § 111.35. Metro Government argues that these are reasonable time, place, and manner restrictions which only slightly burden speech. Subsection (B) of § 111.35 contains a six foot buffer zone and an eighteen inch fixed stage requirement for

semi-nude dancers. Subsection (C) contains a provision prohibiting a customer from directly tipping a dancer while that dancer is appearing semi-nude. Subsection (D) contains a provision prohibiting a dancer, who regularly appears semi-nude, from touching a customer or the clothing of a customer.

The six foot buffer zone, the eighteen inch stage height requirement, and "no tipping/no touch" prohibition, which are all aimed at curtailing the secondary effects associated with adult oriented businesses, have been found to meet the O'Brien test When challenged under the First Amendment, despite their adverse economic impact on such businesses as a whole. See Restaurant Ventures, LLC, 60 S.W.3d at 580; Deja Vu of Nashville, Inc., 274 F.3d at 396-97.

Under the six foot buffer zone and the eighteen inch stage height requirement in § 111.35(B), a dancer can only appear in semi-nude while on an eighteen inch fixed stage with a six feet buffer zone from any customer. Subsection (B) is not unconstitutionally vague because what conduct is being prohibited is clearly understandable to a person with ordinary intelligence and nothing in subsection (B) encourages arbitrary and discriminatory enforcement. Nor is subsection (B) constitutionally overbroad. A law is overbroad where it has few objective criteria for measurement or has very broad language so that public officials could enforce it arbitrarily and chill protected expression. Kentucky Restaurant Concepts, Inc., 209 F.Supp 2d at 682, citing Grayned, 408 U.S. at 108-09.

Plaintiffs also argue that the buffer zone violates the right of freedom of association. However, this

argument was rejected in DeJa Vu of Nashville, Inc., 274 F.3d at 396, because the right to associate for expressive purposes is not absolute and may be infringed upon by regulations adopted to serve compelling state interests which are unrelated to the suppression of ideas and cannot be achieved through means significantly less restrictive of associational freedoms.

Under the "no tipping" restriction in subsection (C) of § 111.35, a dancer – while semi-nude – cannot knowingly or intentionally receive any pay or gratuity directly from a patron, and a patron cannot knowingly or intentionally pay or give a gratuity directly to any semi-nude dancer. What is meant by "directly" is not defined. Plaintiffs argue that the subsection is vague.

Metro Government argues that subsection (C) does not prevent all tipping, just placing tips on the dancer's person or clothing. Metro Government contends that a customer, for example, would be allowed to place a tip in a jar on edge of the stage, which the semi-nude dancer could then retrieve from the jar. As stated in Tilly B. Inc v City of Newport Beach, Cal.App., 69 Cal.App.4th 1, 81 Cal.Rptr. 6 (1998);

> Nothing is vague in the rule that a customer may not "directly" tip an entertainer. A person of ordinary intelligence would understand this to mean a customer cannot place money in the hand, or upon the person, of an entertainer.

The tip jar is a permissible way for the semi-nude dancers to receive compensation for their work because it is not direct (i.e, with nothing intervening; in an

uninterrupted course) but is circuitous (i e, in a roundabout course). A person of ordinary intelligence could reasonably discern that the activity prohibited by the prohibition in subsection (C) of § 111.35 is the placement of a gratuity by a customer on any part of a semi-nude dancer's person or clothing. Accordingly, said subsection is not void for vagueness.

Under subsection (D) of § 111.35, an employee – who regularly appears semi-nude – is prohibited from knowingly or intentionally touching a customer or a customer's clothing Unlike subsections (B) and (C), this subsection is not limited to contact when the employee is performing semi-nude on the premises of an adult entertainment business. The Court agrees with Plaintiffs that the sweep of subsection (D) is overbroad in that its reach prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time. See Kentucky Restaurant Concepts, Inc, 209 F.Supp.2d at 682. Furthermore, subsection (D) is not limited to touching on the premises of an adult entertainment establishment and could be read to prohibit a dancer from touching anyone, off premises, who happens to be a customer. In any social situation, a dancer would then be required to determine who was and was not a customer. Carrying this to its full extent would lead to the absurd result that a dancer could not touch someone like a husband, boyfriend, or relative if that person is also a customer of the adult entertainment establishment. Consequently, the Court finds that subsection (D) is impermissibly overbroad in violation of the First Amendment.

IV. Hours of Operation.

Plaintiffs also challenge the hours of operation provision in § 111.18, which requires adult entertainment establishments to close each day from 1:00 a.m. to 9:00 a.m. Plaintiffs argue that this is one-third of each day and will have a devastating economic impact on their businesses, some of which are open twenty-four hours a day, seven days a week, See affidavits of Brian Franser and Robert Hollis.

Metro Government argues that the Ordinance's hours of operation provision is constitutional under Restaurant Ventures, LLC and every other case on point (e.g. Richland Bookmart, Inc. v. Nichols 137 F.3d 435 (6th Cir., 1998)). In Restaurant Ventures, LLC, 60 S.W.3d at 580-81, the court held that an ordinance prohibiting adult entertainment establishments from operating between the hours of 1:00 a.m. and 3:00 p.m. was a valid exercise of the government's power to regulate said establishments.

Metro Government specifically points to the case of Center For Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9th Cir., 2003), *cert. denied* 124 S.Ct. 1879 (2004), which Metro Government relied on in adopting the current version of Chapter 111, along with other reports/studies concerning the secondary effects occurring in and around adult oriented businesses. See § 111.01 (C)

In Center For Fair Public Policy, 336 F.3d at 1166, the court stated that an ordinance limiting the hours of operation for adult entertainment establishments will be upheld under Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986),

"if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication."

The Court finds that the hours of operation provision in § 111.18 is designed to serve the substantial government interest of reducing the secondary effects associated with the late night operations of adult entertainment businesses, including noise, prostitution, and drug-related offenses. The provision is not substantially broader than necessary, and it allows for alternative avenues of communication, as adult entertainment establishments may still be open 116 hours out of the 168 hour week. Consequently, there is no violation of Plaintiffs' first Amendment rights.

V. Double Jeopardy.

Plaintiffs argue that the penalty provisions in § 111.99 of the Ordinance, particulary the monetary fines, in combination with the Ordinance's suspension and revocation sections, violate the double jeopardy clause under the Kentucky Constitution. This same double jeopardy argument was rejected in Kentucky Restaurant Concepts, Inc., 209 F.Supp.2d at 693, since the suspension and revocation of a license is not a penal deprivation for the purposes of double jeopardy.

VI. Unconstitutional Taking.

Lastly, the Court will address Plaintiffs' argument regarding the unconstitutional taking of their property. Plaintiffs argue that Chapter 111 of the Ordinance amounts to an unconstitutional taking of

property. They contend that the regulations in Chapter 111 go far beyond merely nominally increasing the cost of doing business. Plaintiffs argue that § 111.44 requires them to give up their valuable liquor licenses, which are protected property interests, in order to keep their adult entertainment licenses, or they must cease to engage in such protected speech. Plaintiffs allege that they have made significant investments in time, money, and energy in establishing their businesses and each of their licenses is valuable and cannot be denied without due process.

Metro Government argues that the passage of the Ordinance was a legislative act and not a taking, and does not trigger adjudicative due process requirements. Metro Government contends that Plaintiffs have no enforceable property right beyond the expiration of their annual liquor license.

The Court finds that no unjust taking of Plaintiffs' property rights without due process of law has occurred in this case. In order for Plaintiffs to have a due process claim, they must first have a protected property right. Weiand v Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88 (2000). "Property rights are created and defined by state law." Id. at 93. In Ladt v. Arnold, Ky. App., 583 S.W.2d 702 (1979), the court stated that it has long been the rule in Kentucky that, as between the licensee and the state government, a liquor license is a privilege/temporary permit subject to the government's police power It does not involve a protected property right in the constitutional sense.

Therefore, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) the restraining order entered by this Court on March 5, 2004 is DISSOLVED;

(2) the motion for summary judgment brought by Defendant, Louisville/Jefferson County Metro Government, is GRANTED as to all sections of Ordinance No. 21, Series 2004, amending Chapter 111 of the Louisville/Jefferson County Metro Government Code of Ordinances, EXCEPT § 111.36(B)(2)(b) – as it relates to the disclosure of principal owners – and § 111.35(D); and

(3) Plaintiffs' motion for a temporary injunction pursuant to CR 65.04 is GRANTED IN PART in that Defendant, Louisville/Jefferson County Metro Government, is hereby enjoined from enforcing the following two sections of Ordinance No. 21, Series 2004, amending Chapter 111: § 111.36(B)(2)(b) – as it relates to the disclosure of principal owners – and § 111.35(D), until further order of this Court; Plaintiffs' motion for a temporary injunction as to the remaining sections of Ordinance No. 21, Series 2004, amending Chapter 111 is DENIED.

This is a final and appealable judgment, and there is no reason for delay.

DATED this ___ day of December, 2004.

/s/ Stephen P. Ryan
STEPHEN P. RYAN, JUDGE
Jefferson Circuit Court

cc: H. Louis Sirkin
E. Brian Davis
Allan S. Rubin
Bradley J Shafer
C. Michael Batzell
Paul S. Gold & Frank Mascagni, III
N. Scott Lilly, William P. O'Brien & Winston King
Scott D. Bergthold
Ronald J. Cook
J. Michael McMurray & Jeremy A. Rosenbaum
Christopher S. Burnside

APPENDIX D

SUPREME COURT OF KENTUCKY

2007-SC-000812-DG

[Filed August 26, 2010]

BLUE MOVIES, INC., D/B/A LOVE BOUTIQUE, ET AL.	)
APPELLANTS	)
V.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
APPELLEE	)

ON REVIEW FROM THE COURT OF APPEALS
NOS. 2005-CA-000085–MR, 2005-CA-000090–MR,
2005-CA-000091–MR, 2005-CA-000092–MR,
2005-CA-000100–MR, 2005-CA-000113–MR,
AND 2005-CA-000176–MR
JEFFERSON CIRCUIT COURT NO. 04-CI-001967

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellants, Blue Movies, Inc., D/B/A Love Boutique, et al., of the

Opinion of the Court by Justice Schroder, rendered April 22, 2010, is DENIED.

All sitting. All concur.

ENTERED: AUGUST 26, 2010.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

APPENDIX E

Louisville/Jefferson County Metro Government Metro Code

CHAPTER 111: ADULT ENTERTAINMENT ESTABLISHMENTS

Section

General Provisions

111.01 Findings, declaration of public policy and purpose

111.02 Definitions

111.03 Administration

111.04 Effect and limitation

111.05 through 111.14 Reserved

Restrictions and Operating Regulations

111.15 Signage

111.16 Material not to be subject to public view

111.17 Employee age requirement

111.18 Restricted hours

111.19 Construction requirements

111.20 Location restrictions

111.21 through 111.29 Reserved

111.30 Sale of alcoholic beverages prohibited

111.31 through 111.34 Reserved

111.35 Unlawful activities

Licensing Provisions

111.36 License application; contents

111.37 Information to be current; Director to be notified of changes

111.38 Issuance of license

111.39 Inspections

111.40 Prohibited activities

111.41 License year; license fees

111.42 Employee license required

111.43 License denial, suspension, revocation; hearing and appeal

111.44 Reserved

111.45 Scienter necessary to prove liability

111.46 Failure of official to meet time frame not to risk applicant or licensee rights

111.98 Severability

111.99 Penalty

GENERAL PROVISIONS

§ 111.01 FINDINGS, DECLARATION OF PUBLIC POLICY AND PURPOSE.

(A) The Council finds it has been the experience of other communities, as well as this one, that certain adult entertainment activities which are located near areas zoned for residential use, near schools and public parks, and near malls and similar open spaces that cater to use by family groups and children adversely affect the viability of such nearby properties for their described purposes.

(B) Local governments in Metro Louisville, the Commonwealth of Kentucky and the United States government have spent millions of dollars on community development and neighborhood enhancement projects within the recent past to eliminate blight and to prevent the further deterioration of Metro Louisville neighborhoods.

(C) The Council relies on such evidence of the adverse secondary effects of adult entertainment uses that is within the common knowledge of municipalities and is widely reported in judicial opinions, media reports, land use studies, and crime impact reports made available to the Council, several of which are set forth herein. Additionally, the Council relies on

repeated judicial findings validating municipalities' reasonable reliance on this body of secondary effects evidence to support time, place, and manner regulations of sexually oriented businesses. The Council relies upon and incorporates the findings of secondary effects discussed in the following non-exhaustive list of cases: *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *California v. LaRue*, 409 U.S. 109 (1972); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Currence v. City of Cincinnati*, 2002 U.S. App. LEXIS 1258; *Broadway Books v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986); *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378 (E.D. Ky. 1993); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Richland Bookmart v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003); *Déjà vu v. Metro Government*, 1999 U.S. App. LEXIS 535 (6th Cir. 1999); *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990); *Déjà vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001); *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *World Wide Video of Spokane, Inc. v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002); *Threesome Entertainment v. Strittmather*, 4 F. Supp. 2d 710 (N.D. Ohio 1998);

Bigg Wolf Discount Video Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385 (D. Md. 2003); *Kentucky Restaurant Concepts, Inc. v. City of Louisville and Jefferson County*, 209 F. Supp. 2d 672 (W.D. Ky. 2002); *Restaurant Ventures v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ct. App. Ky. 2001); *Mr. B's Bar & Lounge, Inc. v. Louisville*, 630 S.W.2d 564 (Ct. App. Ky. 1981).

(1) The Council further relies on reports concerning secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Phoenix, Arizona - 1979; Houston, Texas - 1997; Indianapolis, Indiana - 1984; Amarillo, Texas - 1977; Garden Grove, California - 1991; Los Angeles, California - 1977; Whittier, California - 1978; Austin, Texas - 1986; Seattle, Washington - 1989; Tucson, Arizona - 1990; Testimony, Warner-Robins, Georgia - 2000; Newport News, Virginia - 1996; St. Cloud, Minnesota - 1994; New York Times Square study - 1994; Minnesota, State of - 1989; Phoenix, Arizona - 1995-1998; and also on findings of physical abuse from the paper entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota. Based on cases and reports such as these, the Council finds:

(a) Sexually oriented adult entertainment businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on

property values, urban blight, pornographic litter, and sexual assault and exploitation.

(b) Sexual acts, including masturbation, oral and anal sex, sometimes occur at unregulated adult entertainment businesses, especially those which provide private or semi-private booths, rooms, or cubicles for view films, videos, or live sexually explicit shows, which acts constitute a public nuisance and pose a risk to public health through the spread of sexually transmitted diseases.

(c) Adult entertainment businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other certain uses, such as other sexually oriented businesses and establishments licensed to sell alcoholic beverages to minimize the secondary effects associated with such uses and to prevent a concentration of sexually oriented businesses and such uses.

(d) Each of the foregoing negative secondary effects constitutes a harm which the Council has a substantial government interest in abating and/or preventing in the future.

(D) Adult entertainment activity tends to attract an undesirable clientele which discourages neighboring residents from undertaking civic improvements, causes residents and businesses to move elsewhere and frustrates attempts to attract new residences and businesses to come into an area, all of which factors contribute to a diminution of property values and to a general deterioration of neighborhoods.

(E) The small closet-like rooms or "booths" at adult amusement arcades in Metro Louisville and other communities have encouraged persons to loiter for the purposes of engaging in unlawful, often anonymous, sexual conduct and have encouraged lewd conduct in public places, thereby creating public nuisances and generally unsanitary and unhealthful conditions that create dangers to the public health, welfare and safety.

(F) The concentration of sexually explicit movies and books and sexual paraphernalia in adult entertainment establishments which also house sexually explicit movies, as well as hotel rooms rented by the hour to "couples" afforded free sexually explicit movies in the hotel room, have provided prostitutes an appealing and visible meeting place to ply their trade and have created public nuisances in otherwise respectable neighborhoods.

(G) Children, the family environment and residential neighborhoods suffer injury from the deleterious effects and harmful consequences resulting from the distribution of, and exposure to, certain sexually explicit items and devices. This is particularly so when such items and devices are permitted to leave a business's premises and litter the immediate family environment, neighborhood and certain areas where children are likely to be.

(H) The noise generated by patrons coming and going from adult entertainment establishments causes a substantial disruption to nearby residents and modest curtailment of the hours during which entertainment is offered to patrons of such establishments would afford some relief to persons

living in those nearby residences without significantly interfering with the availability of adult entertainment.

(I) Nationally, there is extensive involvement of organized crime in the business of adult bookstores and the disclosure of persons who own, as well as the names of those persons who operate adult bookstores and other adult entertainment establishments will aid law enforcement officials in the enforcement of the federal Racketeer Influences and Corrupt Organizations Act (RICO) and the enforcement of the laws of the Commonwealth of Kentucky, among others, prohibiting the distribution of obscene matter, the use of minors to distribute obscene matter, the advertising of obscene material, the distribution of obscene material to minors, promoting the sale of obscenity, the use of a minor in a sexual performance, the distribution of material portraying a sexual performance by a minor, the promoting of material portraying a sexual performance by a minor and the advertising of material portraying a sexual performance by a minor and the use of minors to distribute materials portraying a sexual performance by a minor.

(J) The Council declares as a matter of public policy that in order to preserve surrounding neighborhoods, to prevent blight and the deterioration of the neighborhoods of Metro Louisville, protect property values, promote the return of residents and businesses to the neighborhoods, protect children from the deleterious effects of exposure to sexually explicit material and decrease the incidence of crime and juvenile delinquency, the licensing and regulation of adult entertainment establishments is a public

necessity and is required in the interest of public health, safety and welfare as well as the economic and aesthetic well-being of the people.

(K) Purposes:

(1) It is the purpose of this chapter to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of Metro Louisville, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within Metro Louisville. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimize the distribution of obscene material;

(2) To prevent the unsanitary conditions which exist at "adult amusement arcades" and to prevent health risks, including AIDs and other sexually transmitted diseases, caused by illicit and unlawful sexual relations in such public establishments;

(3) To protect children and the family environment from the deleterious and harmful effects of exposure to certain sexually explicit items and devices; and

(4) To obtain the identity of persons licensed and to be licensed for the operation of establishments selling, showing, renting or offering certain sexually explicit material or entertainment to insure proper identification of those persons responsible for the operation of such businesses so as to assist in the proper enforcement of this chapter.

(L) It is not the purpose of this chapter to establish community standards on obscenity nor to permit persons to engage in any activity which is in violation of law, including but not limited to, state laws pertaining to the advertising, promotion, distribution or sale of obscene matter or matters portraying a sexual performance by a minor, or state laws pertaining to the use of a minor in a sexual performance or promotion of sexual performance by a minor, or the use of a minor to distribute material portraying sexual performance by a minor.

(1994 Jeff. Code, § 111.01) (Jeff. Ord. 7-1998, passed 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

§ 111.02 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

ADULT ENTERTAINMENT ACTIVITY or ***ACTIVITIES*** or ***ADULT ENTERTAINMENT ESTABLISHMENT*** shall mean regular commercial participation in one or more of the following defined activities:

(1) ***ADULT AMUSEMENT ARCADE.*** An establishment having as one of its principal uses one or more of the following: customer-operated motion picture devices, peep shows, viewing areas and/or similar devices either coin, token or slug operated or which, in consideration of an entrance fee, display matter distinguished or characterized by an emphasis on displays of sexual activities, as hereinafter defined, or which other male or female persons expose to the view of the customer the bare female breast below a point immediately above the top of the areola, human genitals, pubic region or buttocks, even if partially or completely covered by translucent material, or human or simulated male genitals in a discernibly turgid state, even if completely or opaquely covered.

(2) ***ADULT BOOK STORE.*** An establishment having as one of its principal uses the sale, rent or display of pictures, books, periodicals, magazines, appliances and similar material which are distinguished or characterized by their emphasis on displays of sexual activities.

(3) ***ADULT MOTION PICTURE THEATER.*** An establishment having as one of its principal uses the presentation of motion pictures, slide projections and other similar material having as a dominant theme or characterized or distinguished by an emphasis on matter displaying, describing or relating to sexual activities, as hereinafter defined, for observation by persons therein.

(4) ***ADULT NOVELTY CENTER.*** A commercial establishment which regularly features for sale instruments, devices, "adult toys" or paraphernalia which are designed for or marketed

primarily for stimulation of human genital organs or for sadomasochistic use or abuse of oneself or others. Such instruments and devices shall not include condoms, contraceptive devices, spermicidal substances and lubricants, or other such products designed to prevent pregnancy or sexually transmitted diseases.

(5) ***ADULT STAGE SHOW THEATER.*** An establishment having as one of its principal uses the regular presentation of live performances of humans or animals having as a dominant theme or characterized or distinguished by an emphasis on matter displaying semi-nudity or sexual activities for observation by persons therein.

(6) ***ADULT VIDEO CASSETTE RENTAL CENTER.*** A commercial establishment which has as one of its principal business uses the rental or sale of video cassettes or other video recordings which display material distinguished or characterized by an emphasis on displays of sexual activities.

(7) ***CABARET.*** An establishment which regularly features as one of its principal uses persons who appear semi-nude before patrons.

(8) ***COMMERCIAL SEXUAL ENTERTAINMENT CENTER.*** Any commercial establishment not otherwise described herein which as one of its principal uses regularly offers matter, services or entertainment appealing to adult sexual interests if the establishment or its entertainment, services or goods are advertised by or on behalf of the establishment in a manner patently designed to appeal to such adult sexual interests.

(9) ***SELF-DESIGNATED ADULT ENTERTAINMENT CENTER.*** Any establishment which designates all or a portion of its premises as for adults only and has a policy of excluding minors from its premises or from a portion of its premises and which advertises so as to convey the impression that the services, entertainment, matter or goods available at the premises or at the portion of the premises designated for adults only are characterized or distinguished by displays of human genitals or sexual activities.

DIRECTOR. The Director of Inspections, Permits and Licenses or his/her designee.

EMPLOYEE. Any person hired by or suffered or permitted to work in an establishment engaging in adult entertainment activities whether that person receives remuneration or compensation directly from the operator or owner of the establishment, from patrons of the establishment or from any other source whether by contract of employment or otherwise, for work or services performed for the benefit of the adult entertainment establishment. ***EMPLOYEE*** does not include a person exclusively on the premises for repair or maintenance of the premises or for the delivery of goods, such as foods, to the premises.

ESTABLISHMENT. A business entity or endeavor, fixed, mobile or travelling, including its owners, operators, directors, shareholders, partners, employees and possessions.

HEARING OFFICER. The Code Enforcement Board as established pursuant to Ordinance No. 229-

2003 of the Louisville/Jefferson County Metro Government.

LICENSEE. A person in whose name a license to operate an adult entertainment establishment has been issued, as well as the individual or individuals listed as an applicant on the application for an adult entertainment establishment license. In case of an "employee," it shall mean the person in whose name the adult entertainment employee license has been issued.

MATERIALS. Any book, magazine, newspapers, or other printed or written matter, or any picture, drawing, photograph, motion picture, video cassette film or other pictorial representation or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines or materials.

METRO GOVERNMENT. The Louisville/Jefferson County Metro Government.

NUDITY OR STATE OF NUDITY. The showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

OPERATOR. Any individual, partnership, corporation or business entity who establishes and/or maintains a business as its owner or manager and may also mean ***LICENSEE*** as defined hereabove.

PERSON. Any individual, partnership, corporation or business entity.

PRINCIPAL OWNER. Any person owning, directly or beneficially, 20% of a corporation's equity securities, 20% or more of the membership interests in a limited liability company, or, in the case of any other legal entity, 20% or more of the ownership interests in the entity.

PRINCIPAL USE. A substantial or significant use, but not necessarily a majority of the business activity or stock in trade. The fact that a business may have one or more other principal uses unrelated to adult entertainment shall not relieve the business from the provisions of this chapter applicable to adult entertainment establishments. Principal use shall exist in the following circumstances:

(1) Where a business establishment dedicates, or permits the use of, at least 25% of the utilized square footage of its premises for adult entertainment activity or activities; or

(2) Where at least 25% of the gross receipts of a business establishment, excluding food and beverage receipts, result from adult entertainment activity or activities.

REAL ESTATE OWNER. Any individual, partnership, corporation or business entity who has legal title to real estate, with or without accompanying actual possession thereof, or has the beneficial ownership of any real estate and a right to present use of enjoyment thereof, including a mortgage in possession.

REGULARLY. As used in the phrases herein such as "regularly features" and "regularly offers," the term

"regularly" means a consistent or repeated course of conduct engaged in or permitted by the operator of the business.

SEMI-NUDE OR STATE OF SEMI-NUDITY. A state of dress in which opaque clothing covers no more than the genitals, anus, anal cleft or cleavage, pubic area, vulva, and nipple and areola of the female breast, as well as portions of the body covered by supporting straps or devices. This definition shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided that the areola and nipple are not exposed in whole or in part.

SEXUAL ACTIVITIES. Partial or complete male and/or female nudity in conjunction with:

(1) Displays of human genitals in a state of sexual stimulation;

(2) Acts of human masturbation, sexual intercourse or sodomy; or

(3) Holding or other erotic touching of human genitals, pubic region, buttocks or breasts.

SPECIFIED CRIMINAL ACTIVITIES. Any of the following offenses:

(1) KRS 510.040, 510.050, or 510.060 (rape in the first, second, or third degree); KRS 510.070, 510.080, or 510.090 (sodomy in the first, second, or third degree); KRS 510.110, 510.120, or 510.130 (sexual abuse in the first, second, or third degree); KRS 510.140 (sexual misconduct); 510.150 (indecent

exposure); KRS 517.050 (falsifying business records); KRS 529.020, 529.030, 529.040, or 529.050 (prostitution, promoting prostitution in the first, second, or third degree); KRS 529.070 (permitting prostitution); KRS 531.020, 531.030, 531.040 (distributing obscene matter, distributing obscene matter to minors, using minors to distribute obscene matter); KRS 218A.140 et seq. (offenses relating to controlled substances); any offense listed in KRS 531.300 through 531.370 (sexual exploitation of minors offenses); engaging in organized crime (KRS 506.120) relating to a sexually oriented business; criminal attempt, conspiracy or solicitation to commit any of the foregoing offenses or offenses in other jurisdictions that, if the acts would have constituted any of the foregoing offenses if the acts had been committed in Kentucky; for which:

(a) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(b) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(c) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(2) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant.

(1994 Jeff. Code, § 111.02) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

§ 111.03 ADMINISTRATION.

The Director is empowered to enact from time to time such rules and regulations deemed necessary for the orderly and complete administration of this chapter. All regulations shall be submitted to the Mayor and shall become effective within 30 days of submission unless disapproved in writing by the Mayor prior to that date. All licensees and persons with license applications pending shall be mailed copies of all such regulations and they shall be published one time in the newspaper as soon as practical after they become effective.

(1994 Jeff. Code, § 111.03) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.04 EFFECT AND LIMITATION.

It is not the purpose of this section to establish community standards on obscenity nor to permit persons to engage in any activity which is in violation of law, including but not limited to state laws

pertaining to the advertising, promotion, distribution, or sale of obscene matter or matters portraying a sexual performance by a minor, or state laws pertaining to use of a minor in a sexual performance or promotion of a sexual performance by a minor, or the use of a minor to distribute material portraying sexual performance by a minor.

(1999 Lou. Code, § 111.007) (Lou. Ord. No. 320-1987, approved 12-28-1987; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

§§ 111.05 THROUGH 111.14 RESERVED.

RESTRICTIONS AND OPERATING REGULATIONS

§ 111.15 SIGNAGE.

An adult entertainment establishment, except as otherwise provided by laws which may be more restrictive, may not have more than one sign outside, flush to the wall, facial style, not to exceed in size ten feet in length (horizontal to the ground) and three feet in width (vertical to the ground) with no flashing lights and with no pictorial matter which is distinguished or characterized by an emphasis on displays of sexual activities.

(1994 Jeff. Code, § 111.15) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.16 MATERIAL NOT TO BE SUBJECT TO PUBLIC VIEW.

An adult entertainment establishment may not display pictorial representations of sexual activities in such manner as to be subject to public view from outside the business premises, including but not limited to view from public sidewalks, streets, arcades, hallways or passageways.

(1994 Jeff. Code, § 111.16) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.17 EMPLOYEE AGE REQUIREMENT.

(A) An operator or employee of an adult entertainment establishment shall not permit a person under 18 years of age to be employed by or to enter the establishment.

(B) An adult entertainment establishment shall, at all times, cause the entrance of the establishment to be so attended as to insure compliance with the requirements contained in subsection (A) of this section.

(1994 Jeff. Code, § 111.17) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 14-1988, adopted and effective 7-26-1988; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.18 RESTRICTED HOURS.

No adult entertainment establishment shall be or remain open for business between the hours of 1:00 A.M. and 9:00 A.M. on any day.

(1994 Jeff. Code, § 111.18) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 211-2003, approved 12-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.19 CONSTRUCTION REQUIREMENTS.

(A) An adult amusement arcade, except as otherwise provided by laws which may be more restrictive, shall meet the requirements set forth in this section.

(B) Any wall or partition which is situated so as to create a viewing area in which any amusement device or viewing screen is located shall be constructed of not less than one hour fire-restrictive material and shall contain no holes, openings or other perforations. No operator or employee shall allow openings of any kind to exist between viewing rooms or booths nor shall any person make or attempt to make an opening of any kind between viewing booths or rooms.

(C) A person who operates or causes to be operated an adult amusement arcade which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette or other video reproduction which display specified sexual

activities as defined in § 111.01 shall comply with the following requirements:

(1) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's or cashier's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. The view required in this chapter must be by direct line of sight from the manager's or cashier's station.

(2) It shall be the duty of the operator and any employees present in the premises to ensure that the view area specified in subsection (C)(1) of this section remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times. It shall be the duty of the operator to ensure that there is at least one employee on duty and situated in a public area adjacent to the adult arcades, where the view area specified in subsection (C)(1) is visible, at all times that any patron is present in the adult arcades.

(3) No viewing room may be occupied by more than one person at a time.

(4) All floor coverings in viewing booths shall be non-porous, easily cleanable surfaces, with no rugs or carpentry. All wall surfaces and ceiling surfaces shall be constructed of, or permanently covered by nonporous, easily cleanable material. No wood, plywood, composition board, or other porous material shall be used within 48 inches of the floor.

(D) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five footcandles measured at the floor level at all times any patron is present in the premises.

(E) All persons regulated pursuant to this section must comply with the terms and conditions hereof within 60 days after the effective date of this chapter.

(1994 Jeff. Code, § 111.19) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.20 LOCATION RESTRICTIONS.

(A) The public entrance to an establishment engaging in adult entertainment activities shall not be located within 500 feet of any building containing a public or private elementary, middle or secondary school, institution or higher education or business college, or any park-mall or park-like area of open space under the control of a governmental agency, or any building used for a place of religious worship, or any building used for a governmental function or public library. Such distance shall be measured along a straight line from the nearest property line of the property on which the building or public park-like area is located to the entrance to such establishment engaging in an adult entertainment activity.

(B) The public entrance to an establishment engaging in adult entertainment activities may not be located within 500 feet of an area zoned R-R, R-E, R-1, R-2, R-3, R-4, R-5, UN, R-5A, R-5B, R-6, R-7, R-8A, OR-1, OR-2, OR-3, OTF or from an area used for residential purposes. Such distance shall be measured along a straight line from the boundary line of the nearest area zoned or used for residential purposes to the entrance to such establishment engaging in an adult entertainment activity. All adult entertainment establishments shall comply with all other pertinent zoning regulations of the Metro Government.

(C) The public entrance to an establishment engaging in adult entertainment activities shall not be located within 500 feet of the public entrance of another adult entertainment activity establishment.

(D) The public entrance to an establishment engaging in adult entertainment shall not be located within 500 feet of the public entrance of an establishment licensed to serve alcoholic beverages.

(1994 Jeff. Code, § 111.20) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Jeff. Am. Ord. 38-2002, adopted and effective 12-10-2002; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§§ 111.21 THROUGH 111.29 RESERVED.

§ 111.30 SALE OF ALCOHOLIC BEVERAGES PROHIBITED.

An adult entertainment establishment shall not make application for and shall not be granted any license to sell alcoholic beverages otherwise issued pursuant to Chapter 113. The sale, use, or consumption of alcoholic beverages on the premises of an adult entertainment establishment is prohibited, provided that, any adult entertainment establishment which holds a license to sell alcoholic beverages on the effective date of this chapter may continue to serve alcoholic beverages until the expiration date of its annual license at which time it shall not make application for or be granted another such license. Nothing herein shall exempt an adult entertainment establishment from § 111.18.

(1994 Jeff. Code, § 111.45) (Jeff. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§§ 111.31 THROUGH 111.34 RESERVED.

§ 111.35 UNLAWFUL ACTIVITIES.

Nothing contained in this chapter is intended, or shall be construed, to permit or authorize activities which are unlawful under state law or local ordinance. It is unlawful for an operator to knowingly violate the following regulations or to allow, either knowingly or recklessly, an employee or a patron to violate the following regulations.

(A) It shall be a violation of this chapter for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, appear in a state of nudity, regardless of whether such public nudity is expressive in nature.

(B) It shall be a violation of this chapter for an employee to knowingly or intentionally, in an adult entertainment establishment, appear in a semi-nude condition unless the employee, while semi-nude, remains at least six feet from any patron or customer and on a fixed stage at least 18 inches from the floor. The six foot requirement is measured from the edge of the stage where the semi-nude employee is located to the patron seating or standing area, or, if patrons are allowed to sit at the stage, from the edge of the stage to a line or other barrier six feet from the edge beyond which employees are allowed to appear semi-nude.

(C) It shall be a violation of this chapter for any employee, while semi-nude in an adult business, to knowingly or intentionally receive any pay or gratuity directly from any patron or customer or for any patron or customer to knowingly or intentionally pay or give any gratuity directly to any employee, while said employee is semi-nude in an adult entertainment establishment.

(D) It shall be a violation of this chapter for any employee, who regularly appears semi-nude in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer.

(1994 Jeff. Code, § 111.35) (Jeff. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003,

approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

LICENSING PROVISIONS

§ 111.36 LICENSE APPLICATION; CONTENTS.

(A) The principal owner(s) or the operator(s) of an establishment intending to engage, or engaging under a previously issued license in an adult entertainment activity, shall make application for a license with the Director in accordance with this chapter.

(B) Such application shall be in writing, notarized, and shall be in the form prescribed by the Director. The application will be deemed complete when it contains the following information:

(1) The name, business location address, business mailing address and phone number of the establishment and the name and business address of the prospective licensee.

(2) The applicant's full true name, mailing address, date of birth, and a copy of a government-issued photo identification card or set of fingerprints.

(a) If the applicant is one or more natural persons, then all principal owners shall comply.

(b) If the applicant is other than an individual, such as a corporation or partnership, each officer, director, general partner, principal owner and each other person who will participate directly in decisions relating to management of the business shall

sign the application for a license as the applicant and comply with the requirements of this section.

(3) The name and address of the prospective licensee's designated agent for service of process.

(4) If the applicant is not the owner of record of the real property on which the licensed establishment is located or to be located, the application shall include the name and address of the owner of record of the real property.

(5) A designation of the adult entertainment activities, as defined in § 111.02(1) - (9), in which the applicant seeks to engage at the specified location.

(6) All convictions for specified criminal activities, as defined in this chapter, of the applicant or applicants whose names are required pursuant to this section.

(7) The name and mailing address of any person to whom the applicant wants mail notice to be given in case of violation or other matters affecting any license hereunder.

(8) A drawing or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The drawing or diagram need not be professionally prepared but shall be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches.

(1994 Jeff. Code, § 111.36) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted

and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.37 INFORMATION TO BE CURRENT; DIRECTOR TO BE NOTIFIED OF CHANGES.

The information required by § 111.36 shall be kept current by the licensee at all times even after the granting of a license by the Director. It shall be the responsibility of the operator or other person designated in the license application to notify the Director no later than the close of the fifth business day after the effective date of any changes, alterations or modifications in any information contained in the application including, but not limited to: name of the establishment; any change in the corporate or partnership information submitted as part of the application; names and mailing addresses of employees; name and address of designated agent for service of process; designation of the activity or activities to be engaged in at the establishment, as defined in § 111.02(1) - (9); and the name and mailing address of any person the applicant wants mail notice to be given in case of violation or other matters affecting the license.

(1994 Jeff. Code, § 111.37) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.38 ISSUANCE OF LICENSE.

(A) Upon the filing of a completed application for an adult entertainment establishment license or employee license under § 111.42, the Director shall issue a temporary license to the applicant, which temporary license shall expire 15 days after the final decision of the Director to deny or grant the license. Within 20 business days after the receipt of a completed application, the Director shall cause the premises to be inspected for compliance with Louisville/Jefferson County Metro Government zoning, building, safety, health and fire codes. If inspections are not made within the specified 20 days, unless such failure is due to the applicant's or the real estate owner's disallowance of said inspections, the property shall be deemed to comply with the codes specified in the previous sentence. Within 20 business days after the receipt of a completed application, the Director shall either issue a license, or issue a written notice of intent to deny a license, to the applicant. The Director shall approve the issuance of a license unless one or more of the following is found to be true:

(1) An applicant is less than 18 years of age.

(2) An applicant is delinquent in the payment to Metro Government of taxes, fees, fines or penalties assessed against or imposed upon the applicant in relation to an adult entertainment establishment.

(3) An applicant has failed to provide information or true and correct information required of the applicant for issuance of the license.

(4) An applicant, including any principal owner of the adult entertainment establishment, has been convicted of a specified criminal activity, as defined in this chapter.

(5) The license fee required by § 111.41 has not been paid.

(6) The proposed adult entertainment establishment is located in a zoning district other than a district in which adult entertainment businesses are allowed to operate under the applicable zoning regulations of Metro Government or is not in compliance with the location restrictions established for adult entertainment establishments under this chapter.

(7) The applicant's premises have been found by the Director or his designees to not be in compliance with Louisville/Jefferson County Metro Government zoning, building, safety, health or fire codes.

(B) An applicant that is ineligible for a license due to subsection (A)(4) of this section, may qualify for an adult entertainment establishment license only when the time period required by the applicable subsection in § 111.43 has elapsed.

(C) The license, if granted, shall state on its face the name of the persons or persons to whom it is granted, the number of the license issued to that applicant, the expiration date, and the address of the adult entertainment establishment. An adult entertainment establishment employee license shall contain a photograph of the licensee. The adult entertainment establishment license shall be posted in

a conspicuous place at or near the entrance to such business so that it may be easily read at any time. An adult entertainment establishment employee shall keep the employee's license on his or her person or on the premises where the licensee is then working or performing, and shall produce such license for inspection upon request by a law enforcement officer or other authorized Metro Government enforcement official. Such officer or official, pursuant to this chapter, shall request verification of an employee's license only when reasonable and necessary to advance the purposes of this chapter.

(1994 Jeff. Code, § 111.38) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.39 INSPECTIONS.

The application for or the grant of a license to operate an adult entertainment establishment is deemed to permit periodic inspections of the public areas of any such establishment during such establishment's business hours for the purpose of verifying compliance with the terms and conditions of this chapter. This section shall be reasonably construed and applied by enforcement personnel.

(1994 Jeff. Code, § 111.40) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Jeff. Am. Ord. 38-2002, adopted and effective 12-10-2002; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

§ 111.40 PROHIBITED ACTIVITIES.

(A) Immediately upon the effective date of this chapter no person shall operate, own or be employed at an unlicensed adult entertainment establishment, such conduct having been prohibited under Ordinance No. 5, Series 1978, as amended, and the previous version of Chapter 111, as amended. All licenses presently held by adult entertainment establishments shall remain in full force and effect without the necessity of reapplication until the annual renewal date set forth in § 111.41. However, current licenses shall be subject to regulation by the terms of this chapter and shall be in full compliance with this chapter within 60 days after the effective date hereof, provided that adult entertainment establishments which are currently licensed and have obtained non-conforming use status per KRS 100.253 shall be exempt from § 111.20 (Location Restrictions) of this chapter. All pending applications at the time of the effective date hereof and new applications received thereafter shall be subject immediately to the terms of this chapter.

(B) No owner shall permit adult entertainment activities to operate on his property without such adult entertainment activities being properly licensed except as permitted under subsection (A) of this section.

(C) No person shall permit himself to be an operator or an employee at an adult entertainment activity which has not been validly licensed hereunder, except as permitted under subsection (A) of this section.

(D) No person shall own, operate or be employed at an establishment engaged in adult entertainment activities unless all employees of the establishment have obtained the license required by § 111.42 of this chapter.

(1994 Jeff. Code, § 111.41) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.41 LICENSE YEAR; LICENSE FEES.

All adult entertainment establishment licenses shall be for the fiscal year, July 1 to June 30, or the remaining portion of such fiscal year. The annual license fee shall be $1,000 and payable to the Louisville/Jefferson County Metro Government at the time of application. For new applications, annual fees shall be prorated at the rate of $100 per month for the remaining full months of a fiscal year but shall not exceed $1,000. Application for renewal of a license shall be made at least 90 days, but not more than 120 days, before the expiration of the current license and shall be accompanied by the annual fee of $1,000. The renewal application shall also contain any changes in the information required by § 111.36 which have occurred since the previous application. If the renewal application and/or the annual fee are not tendered in a timely fashion, the Director shall serve notice to the licensee that the failure to submit the renewal application and/or the annual fee within ten business days will be deemed an abandonment of the license as of the above-referenced renewal deadline. Service of the notice required by this section shall be deemed

complete upon certified mailing, return receipt requested, or personal delivery.

(1994 Jeff. Code, § 111.42) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.42 EMPLOYEE LICENSE REQUIRED.

(A) Any person intending to be an employee at an adult entertainment establishment shall make application for an employee license with the Director in accordance with this section. The application shall be in writing, notarized, and shall be in the form prescribed by the Director and shall be deemed complete when it contains the following items:

(1) The legal name of the applicant;

(2) Any and all aliases or names used or to be used by the applicant in the course of prior, current or prospective appearances or performances as a dancer, performer or entertainer;

(3) The applicant's mailing address where the applicant may be contacted by the Director;

(4) The applicant's date of birth;

(5) A set of the applicant's fingerprints suitable or a copy of a government-issued photo identification card;

(6) A recent photograph of the applicant; and

(7) Any information required under this section deemed to be private and/or confidential within the meaning of KRS 61.878, or within the constitutional right to privacy, shall not be disclosed to any person other than law enforcement agencies or other governmental agency.

(B) The applicant shall submit an annual license fee of $25 with the application for an employee license and the Director shall immediately issue a temporary employee license pending a final decision by the Director to grant or deny the employee license. Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this chapter. If no record of such conviction is found, the Director shall issue an annual employee license. The license so granted shall expire on June 30 of each year and shall be annually reissued by the Director upon application therefor by the employee unless the Director confirms that the applicant has been convicted of any of the above-described offenses. In the event the Director confirms a conviction of a proscribed offense, he/she shall issue the applicant a notice of intent to deny the employee license. Application for a renewal license shall be made at least 90 days, and not more than 120 days, prior to expiration of the employee's current license. Within 30 days after the effective date of this chapter, no person shall be an employee at an adult entertainment establishment without having obtained the license required by this section.

(1994 Jeff. Code, § 111.43) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003,

approved 4-1-2003; Lou. Metro Am. Ord. No.21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.43 LICENSE DENIAL, SUSPENSION, REVOCATION; HEARING AND APPEAL.

(A) The Director shall issue a written letter of intent to suspend an adult entertainment license or an employee license, as applicable, for a period not to exceed 30 days if it determines that the licensee knowingly or recklessly violated or is not in compliance with any section of this chapter, or, knowingly refused to allow an inspection of the licensed premises as authorized by this chapter.

(B) The Director shall issue a written statement of intent to revoke an adult entertainment establishment license or an employee license, as applicable, if the licensee knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period.

(C) The Director shall issue a written statement of intent to revoke an adult entertainment establishment license or an employee license, as applicable, if:

(1) The licensee knowingly gave false information in the material submitted during the application process;

(2) The licensee has knowingly engaged in or allowed possession, use, or sale of controlled substances on the premises;

(3) The licensee has knowingly engaged in or allowed prostitution on the premises;

(4) The licensee has knowingly operated the adult entertainment establishment during a period of time when the licensee's license was suspended;

(5) The licensee has knowingly engaged in or allowed any act of sexual intercourse, sodomy, oral copulation, or masturbation to occur in or on the licensed premises. This subsection will not apply to an adult motel, unless the licensee knowingly allowed the foregoing sexual activities to occur either in exchange for money or in a place within public view.

(D) The fact that a conviction is being appealed shall have no effect on the revocation of the license, provided however, that any reversal of a conviction shall automatically eliminate that conviction from consideration in this chapter.

(E) When, after the notice and hearing procedure described in subsection (F) of this section, the Director revokes a license, the revocation shall continue for one year and the licensee shall not be issued an adult entertainment establishment license or an employee license for one year from the date revocation becomes effective, provided that, if the conditions of subsection (G) of this section are met, a provisional license will be granted pursuant to that subsection.

(F) If facts exist for denial, suspension, or revocation of an adult entertainment establishment license or an employee license issued under this chapter, the Director shall notify the applicant or licensee (respondent) in writing of the intent to deny,

suspend or revoke the license, including the grounds therefore, by personal delivery, or by certified mail. The notification shall be directed to the most current business address on file with the Director, and will provide the address of the Hearing Officer to which the respondent should direct his or her response. Within five working days of receipt of such notice, the respondent may provide to the Hearing Officer, in writing, a response that shall include a statement of reasons why the license or permit should not be denied, suspended, or revoked. Within three working days of the receipt of respondent's written response, the Hearing Officer shall notify respondent in writing of the hearing date on respondent's denial, suspension or revocation proceeding.

(1) Within ten working days of the receipt of respondent's written response, the Hearing Officer shall conduct a hearing at which respondent shall have the opportunity to be represented by counsel, present evidence and witnesses on his or her behalf, and cross-examine adverse witnesses. Such proceeding shall be transcribed or recorded. Within ten working days after any hearing, the Hearing Officer shall issue a written decision on the matter and mail such decision to the respondent by certified mail no later than three working days after the date of such decision.

(2) If a response is not received by the Hearing Officer in the time stated or, if after hearing, the Hearing Officer finds that grounds as specified in this chapter exist for denial, suspension, or revocation, then such denial, suspension, or revocation shall become final five working days after the Hearing Officer sends, by certified mail, the written decision and notice that the license has been denied,

suspended, or revoked. Such notice shall include a statement advising the applicant or licensee of the right to appeal such decision to a court of competent jurisdiction.

(G) When a decision to deny, suspend or revoke a license becomes final, the applicant or licensee (aggrieved party) whose application for a license has been denied, or whose licenses has been suspended or revoked, shall have the right to appeal such action to a court of competent jurisdiction within 15 working days of the date the adverse decision becomes final. Until the time for an appeal has passed, any temporary license issued to the aggrieved party under this chapter shall remain in effect throughout the administrative proceedings described in this section. Upon the filing of any court action to appeal, challenge, restrain or otherwise enjoin the enforcement of the denial, suspension or revocation, the Director shall immediately issue the aggrieved party a provisional license and shall file the record of the administrative proceeding with the reviewing court within ten business days after he/she receives notice of said action. The provisional license shall allow the aggrieved party to continue operation of the adult entertainment establishment or to continue employment as an adult entertainment employee, as the case may be, and will expire upon the court's entry of a judgment on the merits of the aggrieved party's action to appeal, challenge, restrain or otherwise enjoin the enforcement of the Director's decision.

(1994 Jeff. Code, § 111.44) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Jeff. Am. Ord. 38-2002, adopted and effective 12-10-2002; Lou. Metro Ord. No. 50-2003,

approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.44 RESERVED.

§ 111.45 SCIENTER NECESSARY TO PROVE LIABILITY.

This chapter does not impose strict liability for violations of its provisions. Where any provision or offense herein fails to state a necessary level of culpability to establish a violation or liability, the offense shall be established upon a showing that the person acted knowingly or recklessly with regard to the predicate act. Notwithstanding anything to the contrary, for the purposes of this chapter, an act by an employee shall be imputed to the adult entertainment licensee for the purpose of establishing a violation of this chapter, or for purposes of license denial, modification, or revocation only if a licensee allowed, either knowingly or by reckless failure to supervise, a violation of this chapter to occur. It shall be a defense to liability that the adult entertainment establishment licensee was powerless to prevent the violation.

(Lou. Metro Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.46 FAILURE OF OFFICIAL TO MEET TIME FRAME NOT TO RISK APPLICANT OR LICENSEE RIGHTS.

In the event that a government official is required to take an act or do a thing pursuant to this chapter within a prescribed time, and fails to take such act or do such thing within the time prescribed, said failure

shall not prevent the exercise of constitutional rights of an applicant or licensee. If the act required of the official under this chapter, but not completed in the time prescribed, includes approval of condition(s) necessary for approval by the Metro Government of an applicant or licensee's application for an adult entertainment establishment license or an adult entertainment establishment employee license (including a renewal), the applicant or licensee shall be deemed to have satisfied the condition(s) for which approval was sought.

(Lou. Metro Ord. No. 21-2004, approved 3-1-2004) Penalty, see § 111.99

§ 111.98 SEVERABILITY.

Each section and provision of this chapter is hereby declared to be independent sections and provisions and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of said chapter, or the application thereof to any person or circumstance, is held to be invalid, the remaining sections or provisions and the application of such sections or provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid. Additionally, should any license procedure in this chapter be deemed invalid, the substantive regulations and restrictions contained herein shall not be affected thereby.

(1994 Jeff. Code, § 10.07) (Jeff. Ord. 36-1994, adopted and effective 12-20-1994; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

§ 111.99 PENALTY.

(A) Any person who violates any provision of this chapter shall be subject to a civil penalty of not less than $100 nor more than $1,000 as imposed by the Director. Each day that a violation continues after notice has been served shall be deemed a separate offense. Any person cited pursuant to this subsection (A) and assessed a civil penalty shall have the right to appeal such penalty to the Hearing Officer in accordance with Ordinance No. 229-2003.

(B) Notwithstanding subsection (A) above, any person who violates any provision of this chapter or who knowingly provides false information in an attempt to gain or maintain a license, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $250 nor more than $500 or imprisonment not to exceed 90 days, or both, for each offense. Any person cited hereunder for a failure to meet a requirement hereof may be cited again for said failure one or more days after a prior citation and in such case each citation shall constitute a separate offense.

(C) In addition to the penalties provided herein for violations of this chapter, the Director is authorized to pursue remedial civil actions for violations of this chapter by civil complaint or petition for injunctive relief, declaration of rights or other appropriate

proceedings filed in the Jefferson County, Kentucky Circuit Court.

(1994 Jeff. Code, § 111.99) (Jeff. Ord. 24-1987, adopted and effective 9-22-1987; Jeff. Am. Ord. 7-1998, adopted and effective 4-1-1998; Lou. Metro Ord. No. 50-2003, approved 4-1-2003; Lou. Metro Am. Ord. No. 21-2004, approved 3-1-2004)

APPENDIX F

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States,

Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XXI

Section 1.
The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.
The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.
This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

180 (2)

Supreme Court, U.S.
FILED

No. 10-952

JAN 21 2011

OFFICE OF THE CLERK

In the

Supreme Court of the United States

BLUE MOVIES, INC. D/B/A/ LOVE BOUTIQUE, ET AL.,
Petitioners,

v.

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

VOLUME 2 OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX
TABLE OF CONTENTS

VOLUME 1

Appendix A: Opinion of the Court by Justice Schroder Affirming in Part, Reversing in Part and Remanding, Supreme Court of Kentucky, (April 22, 2010) 1a

Appendix B: Opinion Affirming in Part and Reversing in Part, Commonwealth of Kentucky, Court of Appeals, (October, 5, 2010) 40a

Appendix C: Opinion and Order, Jefferson Circuit Court, Division Six, (December 14, 2004) 140a

Appendix D: Order Denying Petition for Rehearing, Supreme Court of Kentucky, (August 26, 2010) 166a

Appendix E: Louisville/Jefferson County Metro Government, Metro Code, Chapter 111 ..... 168a

Appendix F: United States Constitution
Amendment I 212a
Amendment XIV 212a
Amendment XXI 214a

VOLUME 2

Appendix G: Intervening Plaintiffs' Verified Complaint for Declaratory Relief, Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Attorney Fees, Jefferson Circuit Court,
(December 3, 2003) 215a

Appendix H: Brief of Appellants/Cross-Appellees, Commonwealth of Kentucky, Court of Appeals,
(March 3, 2006) 241a

Appendix I: Motion for Discretionary Review, Commonwealth of Kentucky, Supreme Court,
(November 2, 2007) 330a

Appendix J: Order Granting Discretionary Review, Supreme Court of Kentucky,
(April 16, 2008) 349a

Appendix K: Brief of Movants-Appellants, Commonwealth of Kentucky, Supreme Court, (June 24, 2008) 351a

APPENDIX G

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

NO. 02-CI-06086
HON. STEPHEN RYAN

[Filed December 3, 2003]

TAYLOR BOULEVARD THEATRE, INC., d/b/a *Deja Vu* and *Erotic Touch*, a Kentucky Corporation, BLUE MOVIES, INC., d/b/a *Love Boutique*, a Kentucky Corporation, and WIN, PLACE & SHOW BAR, INC., d/b/a *Win, Place & Show Bar*, a Kentucky Corporation	)
Intervening Plaintiffs	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
Defendant	)

INTERVENING PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY RELIEF, RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DAMAGES, AND ATTORNEY FEES

COME NOW the Intervening Plaintiffs, Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* and *Erotic Touch*, Blue Movies, Inc., d/b/a *Love Boutique*, and Win, Place & Show Bar, Inc., d/b/a *Win, Place & Show Bar* (who are all collectively referred to here as the "Intervening Plaintiffs"), by and through their attorneys, and for their claims for relief against the Defendant, state as follows:

INTRODUCTION

1. This is a civil action wherein Intervening Plaintiffs pray for a declaratory judgment, damages, a temporary restraining order, and both a preliminary injunction and permanent injunction to restrain and enjoin the Defendant, as well as its agents, employees and representatives, from acting under color of state law to deprive the Intervening Plaintiffs of their rights, privileges and immunities secured to them by the Constitutions of the United States and the State of Kentucky. Specifically, Intervening Plaintiffs seek to have this Court declare as unconstitutional both on its face and as applied, and to enjoin, Section 111.18 of Chapter 111 of the Louisville/Jefferson County Metro Government Code of Ordinances as recently amended by the Legislative Council of the Louisville/Jefferson County Metro Government on November 25, 2003 (hereinafter

"Section 111.18," or simply the "Ordinance"). A copy of the draft Ordinance amending Section 111.18 is attached hereto as Ex. A, and a copy of Chapter 111, which provides the definitions relevant to the Ordinance as well as the previous version of Section 111.18 is attached hereto as Ex. B; both being incorporated herein by reference.

JURISDICTION

2. This Court has jurisdiction and power to grant the injunctive relief requested pursuant to C.R. 64.04.

3. This Court has the jurisdiction and authority to grant the temporary restraining order prayed for here pursuant to CR 65.03.

4. This Court has the jurisdiction and authority to grant the declaratory relief prayed for here pursuant to CR 57.

5. Jurisdiction to adjudicate the Intervening Plaintiffs' federal constitutional claims is conferred pursuant to 42 U.S.C. §1983.

6. Authority for Intervening Plaintiffs' request for attorney's fees and costs is conferred by 42 U.S.C. §1988.

7. No other action, civil or criminal, is pending in any state court involving the Intervening Plaintiffs regarding the activities and events at issue here.

8. Venue resides in this Court and is proper and appropriate as the various acts complained of occurred, and the Defendant is located within, the County of Jefferson, Kentucky.

PARTIES

9. Intervening Plaintiff, Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* and *Erotic Touch,* is a corporation duly organized under the laws of the State of Kentucky since 1981, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 3421 and 3423 Taylor Boulevard, in Louisville, Kentucky, and operates thereon two businesses known as "*Deja Vu*" and "*Erotic Touch*." *Deja Vu* is a cabaret style nightclub that features live, non-obscene, clothed, semi-nude, and nude performance dance entertainment presented to the consenting adult public. This performance dance entertainment constitutes speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution. *Erotic Touch* is a retail establishment that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines. These materials constitute speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution.

10. *Deja Vu* has been open for business at 3421 Taylor Blvd., in its current form since 1999, and currently operates from 11:00 a.m. to 2:00 a.m. Monday through Thursday, from 11:00 a.m. to 4:00 a.m. on Fridays and Saturdays, and from 4:00 p.m. to 2:00 a.m. on Sundays. Prior to 1999, *Deja Vu* operated a retail establishment that presented, sold, and rented to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. Such a retail "adult" facility has operated on these premises since 1970.

11. *Erotic Touch* operates at 3423 Taylor Blvd., from 9:00 a.m. to 2:00 a.m. Monday through Thursday, from 11:00 a.m. to 4:00 a.m. on Fridays and Saturdays, and from 1:00 p.m. to 2:00 a.m. on Sundays.

12. Intervening Plaintiff, Blue Movies, Inc., d/b/a *Love Boutique* ("*Blue Movies*"), is a corporation duly organized under the laws of the State of Kentucky since 1982, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 140 West Jefferson, in Louisville, Kentucky, and operates thereon a business known as the "Love Boutique." The *Love Boutique* is a retail establishment that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines. These materials constitute speech and expression protected by the First and Fourteenth Amendments to the

United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution.

13. *Blue Movies* has operated at 140 West Jefferson only since May, 2003, and previously operated its establishment at 244 West Jefferson, in the City of Louisville. *Blue Movies* has been in operation in the City of Louisville for thirty-one years, and was recently required to move to the 140 West Jefferson site as a result of an eminent domain action brought by the Louisville/Jefferson County Metro Government in regard to the property that *Blue Movies* was leasing at 244 West Jefferson. As a result of that eminent domain action, *Blue Movies* has recently, this year, expended in excess of $400,000.00 in renovation and improvements at the 140 West Jefferson location in order for it to be able to operate its retail establishment at that address. *Blue Movies* operates, and has operated in the past, twenty-four hours a day, seven days a week.

14. Intervening Plaintiff, Win, Place & Show Bar, Inc., d/b/a *Win, Place & Show Bar*, is a corporation duly organized under the laws of the State of Kentucky since 1999, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 3425 Taylor Boulevard, in Louisville, Kentucky, and operates thereon a business known as "*Win, Place & Show Bar*" (hereinafter "*Win, Place & Show*"). *Win, Place & Show* is a cabaret style nightclub that features live, non obscene performance dance entertainment presented to the consenting

adult public where entertainers perform at times clothed, at other times "topless," and still at other times fully nude. This performance dance entertainment constitutes speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution. *Win, Place & Show* possesses a liquor license to sell alcoholic beverages on the premises, and a specific license to sell such beverages and to remain open until 4:00 a.m.

15. *Win, Place & Show* has operated at 3425 Taylor Boulevard since 1999, and its current hours of operation are from 12:00 p.m. to 2:00 a.m. Monday through Thursday, and from 12:00 p.m. to 4:00 a.m. on Fridays and Saturdays.

16. In the past, Taylor Boulevard Theatre, Inc. and *Blue Movies* have been licensed by the City of Louisville pursuant to its "adult" business licensing and regulatory ordinance. The licenses have never been suspended or revoked, but have recently not been formally renewed as a result of various litigation and injunctions entered both in the federal and state courts.

17. Defendant, Louisville/Jefferson County Metro Government (sometimes simply "Metro"), is a political subdivision within the State of Kentucky, and is authorized to enact laws within the area of the County of Jefferson, and which has enacted, through the actions of its Legislative Council (sometimes simply "Council"), the Ordinance challenged hereby.

Upon information and belief, Metro is and will be taking the position that the Intervening Plaintiffs, and each and every one of them, will be subject to, and will be required to comply with, Section 111.18 of the Louisville/Jefferson County Metro Government Code of Ordinances, as recently amended.

18. Because the Ordinance is fatally overbroad, and because many of the Intervening Plaintiffs' entertainers and customers would not have the interest and/or financial wherewithal to seek legal redress in regard to the violation of their own constitutional rights, Intervening Plaintiffs have standing to assert not only their own rights in this action, but the rights of all of their employees, entertainers, future entertainers, and customers as well, and are permitted to facially challenge the Ordinance.

FACTUAL ALLEGATIONS

19. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

20. Section 111.02 of the Louisville/Jefferson County Code of Ordinances defines "Adult Entertainment Activity" or "Activities" or "Adult Entertainment Establishment" as one or more of the following defined activities:

> "(1) ADULT AMUSEMENT ARCADE. An establishment having as one of its principal uses one or more of the following: customer-operated motion

picture devices, peep shows, viewing areas and/or similar devices either coin, token or slug operated or which, in consideration of an entrance fee, display matter distinguished or characterized by an emphasis on depictions of sexual activities, as hereinafter defined, or which other male or female persons expose to the view of the customer the bare female breast below a point immediately above the top of the areola, human genitals, pubic region or buttocks, even if partially or completely covered by translucent material, or human or simulated male genitals a discernibly turgid state, even if completely or opaquely covered.

(2) ADULT BOOK STORE. An establishment having as one of its principal uses the sale, rent or display of pictures, books, periodicals, magazines, appliances and similar material which are distinguished or characterized by their emphasis or depictions of sexual activities.

(3) ADULT ENTERTAINMENT PROVIDER. A commercial establishment, such as a hotel or motel, which in addition to its primary business purpose of providing services unrelated to depictions of sexual activities, makes entertainment (either live or on film or other video recordings) available to its customers and such entertainment has

as a dominant theme or is characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities, if such establishment advertises the availability of such adult entertainment at its establishment. The advertisement of such materials shall not include the posting of a card or handbill on or near a television set in a hotel or motel room advising room guests that such adult motion picture and/or films are available upon request of the guest, or advertising informing the public of the availability of commercial cable channels.

(4) ADULT MOTION PICTURE THEATER. An establishment having as one of its principal uses the presentation of motion pictures, slide projections and other similar material having as a dominant theme or characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities, as hereinafter defined, for observation by persons therein.

(5) ADULT STAGE SHOW THEATER. An establishment having as one of its principal uses the presentation of live performances of humans or animals having as a dominant theme or characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities for observation by persons therein.

(6) ADULT VIDEO CASSETTE RENTAL CENTER. A commercial establishment which has as one of its principal business uses the rental or sale of video cassettes or other video recordings which depict material distinguished or characterized by an emphasis on depictions of sexual activities.

(7) CABARET. An establishment which features as one of its principal uses, entertainers and/or waiters and/or bartenders, male or female impersonators and/or persons, either male or female, who expose anytime to public view of the patrons of the establishment the bare female breast below a point immediately above the top of the areola, human genitals, pubic region or buttocks, even if partially or completely covered by translucent material, and/or human or simulated male genitals in a discernibly turgid state, even if completely and opaquely covered.

(8) COMMERCIAL SEXUAL ENTERTAINMENT CENTER. Any commercial establishment not otherwise described herein which as one of its principal uses make available matter, services or entertainment appealing to adult sexual interests if the establishment or its entertainment, services or goods are advertised by or on behalf of the establishment in a manner patently

designed to appeal to such adult sexual interests.

(9) MASSAGE PARLOR. An establishment for treating the human body by rubbing, stroking, kneading, tapping or similar treatment with the hand or any other part of the human body which promotes its services in a manner designed to appeal to the patron's sexual interest.

(10) SELF-DESIGNATED ADULT ENTERTAINMENT CENTER. Any establishment which designates all or a portion of its premises as for adults only and has a policy of excluding minors from its premises or from a portion of its premises or which advertises so as to convey the impression that the services, entertainment, matter or goods available at the premises or at the portion of the premises designated for adults only are characterized or distinguished by depictions of sexual activities."

21. Section 111.02 of the Louisville/Jefferson County Code of Ordinances defines "Sexual Activities" as:

"Partial or complete male and/or female nudity in conjunction with:

(1) Depiction of human genitals in a state of sexual stimulation;

(2) Acts of human masturbation, sexual intercourse or sodomy; or

(3) Holding or other erotic touching of human genitals, pubic region, buttocks or breasts."

22. Section 111.36(A) of the Louisville/Jefferson County Code of Ordinances requires that "[t]he owner or operator of an establishment intending to engage, or engaging under a previously issued licence in an adult entertainment activity shall make application for a license with the Director in accordance with this ordinance."

23. Section 111.18 of the Louisville/Jefferson County Code of Ordinances previously provided that "[a]n establishment licensed to engage in adult entertainment shall not permit any person to conduct, show, state or perform any entertainment, whether live or on film, video tape, or other video recording or to perform massage between the hours of 2:00 a.m. and 8:00 a.m."

24. On November 25, 2003, the Legislative Council of the Louisville/Jefferson County Metro Government enacted the Ordinance which repealed, amended and reenacted §111.18 to read that "[a]n adult entertainment establishment, as defined in Section 111.02, shall not operate or offer adult entertainment activity or materials between the hours of 1:00 a.m. and 11:00 a.m. Monday through Saturday, nor on Sunday between the hours of 1:00 a.m.

and 1:00 p.m." For whatever reason, this Ordinance was enacted on an emergency basis in that it is to "take effect upon its passage and approval."

25. *Deja Vu* estimates that it would suffer a 26% reduction in gross revenues, a 23% reduction in customers viewing protected entertainment, and a 27% reduction in the number of entertainment performances conducted on its premises as a result of compliance with the Ordinance.

26. *Erotic Touch* estimates that it would suffer a 20% reduction in gross revenues, which represents directly a reduction in the sale and rental of expressive materials, as a result of compliance with the Ordinance.

27. *Blue Movies* estimates that it would suffer a 30% reduction in gross revenues, which represents directly a reduction in the sale and rental of expressive materials, as a result of compliance with the Ordinance.

28. *Win, Place & Show* estimates that it would suffer a 35% reduction in gross revenues, in customers viewing protected entertainment, and entertainment performances conducted on its premises as a result of compliance with the Ordinance.

UNCONSTITUTIONALITY OF THE ORDINANCE

29. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

30. The Ordinance is unconstitutional, both facially and as applied, and is in violation of Intervening Plaintiffs' First, Fifth, Ninth, and Fourteenth Amendment rights under the United States Constitution and their corollary rights under the Kentucky Constitution for, among others, the following reasons:

(a) It was not lawfully enacted;

(b) It acts not as a content neutral law of general applicability, but rather, as an impermissible prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Kentucky Constitution;

(c) It is an impermissible content-based restriction in violation of the First and Fourteenth Amendments;

(d) It is overbroad in its application to constitutionally protected activities, and violates **Renton v. Playtime Theatres,** 475 U.S. 41 (1986) in that it fails to offer a reasonable opportunity to open and operate an "adult" entertainment business in Jefferson County;

(e) It violates Intervening Plaintiffs' constitutional rights to free speech and expression in that it is overbroad and is not narrowly tailored in its restrictions contrary to the First and Fourteenth Amendments to the United States Constitution, and further violates Intervening Plaintiffs' fourteenth Amendment rights to engage in a lawful occupation and attempt to impose "unconstitutional conditions" upon persons seeking to engage in constitutionally protected activities, which in an of itself is a violation of the First and Fourteenth Amendments of the United States Constitution;

(f) It violates the First and Fourteenth Amendments to the United States Constitution in that the restrictions on protected speech and expression are not necessary to a compelling governmental interest, and they are not the least restrictive means available to accomplishing any asserted governmental goal.

(g) It violates the First and Fourteenth Amendments to the United States Constitution in that the restrictions on protected speech and expression do not further a substantial governmental interest, they are not narrowly tailored to directly advance any such interest in that the restrictions upon protected expression are greater than is essential to further a permissible governmental

interest, and they are not supported by any competent evidence establishing that such restrictions would be effective in furthering any substantial governmental interest. In addition the restrictions are not within the government's power to enact;

(h) It violates Intervening Plaintiffs' equal protection rights under the Fourteenth Amendment in that it unconstitutionally discriminates against adult businesses and their employees and entertainers based upon the content of speech, and further it creates and permits uneven treatment in the exercise of constitutionally protected rights in the Commonwealth of Kentucky by allowing standards to vary from county to county, city to city, and township to township, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

(i) It violates Intervening Plaintiffs' First Amendments rights under the First Amendment and equal protection and substantive due process rights under the Fourteenth Amendment in that it unconstitutionally discriminates against, among, and between businesses and individuals engaged in substantially similar conduct;

(j) It violates the liberty and occupational liberty interests of the Intervening Plaintiffs and others by impermissibly restricting lawful, and indeed constitutionally protected occupational activities;

(k) It impermissibly singles out First Amendment protected businesses and conduct for discriminatory regulations, and thereby violates the equal protection clause of the Fourteenth Amendment;

(l) Numerous provisions within the Ordinance sections themselves are impermissibly vague, ambiguous and overbroad, including but not limited to various definitions as contained in JCO §111.02;

(m) It constitutes a taking without just compensation in violation of the Fifth and Fourteenth Amendments;

(n) It violates the substantive due process rights of Intervening Plaintiffs and others;

(o) It was not enacted upon a proper basis, nor supported by competent and material evidence;

(p) It unduly, impermissibly, and unconstitutionally restricts the ability of individuals and businesses to engage in

First Amendment protected activities within Jefferson County;

(q) It contains provisions which are overbroad and in violation of the Freedom of Association Clause of the First Amendment and the liberty component of the Due Process Clause of the Fourteenth Amendment;

(r) It violates the Free Exercise and Establishment of Religion Clauses of the First Amendment in violation of **Lemon v. Kurtzman**, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), et al.

(s) It effectuates an impermissible prior restraint upon constitutionally protected speech and expression related activities, contrary to the First and Fourteenth Amendments to the United States Constitution;

(t) It fails to provide for the procedural guarantees required under **Freedman v. Maryland**, 380 U.S. 51 (1965), and **FW/PBS v. Dallas**, 493 U.S. 215 (1990); and,

(u) It places unfettered discretion in the hands of the decisionmaker regarding the granting, denial, revocation, restriction, and/or suspension of a license.

COUNT I - INJUNCTION

31. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

32. Any action taken by the Defendant and others to enforce the Ordinance against the Intervening Plaintiffs herein will be taken under color of law and will deprive Intervening Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which damages are an inadequate remedy as a matter of law.

33. Intervening Plaintiffs have a substantial likelihood of success on the merits in regard to their constitutional claims; the public interest weighs in favor of preventing deprivation of constitutional rights; and any balancing of harms between the parties weighs in favor of the Intervening Plaintiffs and against the Defendant in any attempt to enforce a clearly and hopelessly flawed unconstitutional Ordinance. Accordingly, temporary, preliminary, and permanent injunctive relief is warranted here to enjoin enforcement of the Ordinance.

34. For the reasons set forth above and to preclude Intervening Plaintiffs and others from being denied their rights under the United States Constitution and their corollary rights under the Kentucky Constitution, this Court should enter an order enjoining, temporarily, preliminarily and permanently, Defendant, its

employees, agents, and representatives, as well as all others who receive actual or constructive notice of the decision of this Court, from enforcing the Ordinance against the Intervening Plaintiffs and indeed anywhere in the City of Louisville, and the County of Jefferson, Kentucky.

COUNT II - DECLARATORY RELIEF

35. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

36. This Court has the authority to declare the rights and other relations of the Intervening Plaintiffs and of the Defendant, and should do so here.

37. Because of the questioned constitutionality of the Ordinance and its enforcement against Intervening Plaintiffs, Intervening Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of the respective rights of the parties hereto.

38. This Court should declare, for the reasons set forth above, that the Ordinance is unconstitutional both on its face and as applied to the Intervening Plaintiffs, and is in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the corollary rights under the Kentucky Constitution.

COUNT III - DAMAGES

39. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

40. Pursuant to 42 U.S.C. §1983 and common law, Intervening Plaintiffs are entitled to damages for deprivations to their constitutional rights.

41. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and the corollary provisions as contained in the Constitution of the State of Kentucky, Intervening Plaintiffs are entitled to "just compensation" for governmental "takings," whether total or partial, of both their property and property rights.

42. The hours of operation provisions contained in Section 111.18 of Chapter 111 constitute governmental "takings" within the purview of the Fifth and Fourteenth Amendments to the United States Constitution and the corollary protections afforded by the Constitution of the State of Kentucky. These regulatory "takings," to the extent that they do not render the Ordinance unconstitutional in-and-of-itself, entitle Intervening Plaintiffs to "just compensation" for the deprivations of their property and property rights, which has not been paid by Defendant to the Intervening Plaintiffs.

43. As a direct and proximate result of the enactment of the Ordinance and its

unconstitutional application and enforcement by the Defendant against the Intervening Plaintiffs, Intervening Plaintiffs have incurred and suffered significant and substantial damages, and will in the future suffer significant and substantial damages, including but not limited to loss of constitutional rights, loss of earnings, lost business profits, loss of business reputation, and having to incur costs and attorney fees in seeking protection of their constitutional rights asserted herein. Pursuant to 42 U.S.C. §1983 and common law, Intervening Plaintiffs are therefore entitled to damages for the deprivations of their constitutional rights as well as the monetary losses incurred.

44. Intervening Plaintiffs are entitled to a judgment of damages and just compensation in amounts to which they are found to be entitled at trial.

COUNT IV - ATTORNEYS FEES

45. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

46. Because Section 111.18 of Chapter 111, as amended, is unconstitutional on its face and as applied to the Intervening Plaintiffs, and because it would deprive the Intervening Plaintiffs and others of their fundamental federal constitutional rights, Intervening Plaintiffs, as prevailing parties in the aforementioned matter, are entitled to recover actual attorney fees and costs pursuant to 42

U.S.C.1988 in seeking to have the aforementioned Ordinance declared unconstitutional and enjoined thereby.

RELIEF REQUESTED

WHEREFORE, Intervening Plaintiffs request this Honorable Court to enter an order and/or judgment in their favor and against Defendant as follows:

A. Declaring Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended, to be unconstitutional, both facially and as applied to Intervening Plaintiffs herein, and to be in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Kentucky Constitution;

B. Entering a temporary restraining order enjoining the Defendant, as well as its officers, agents, employees and representatives and all other persons acting through or for them, from enforcing or implementing Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended;

C. Entering both a preliminary and permanent injunction, enjoining the Defendant, as well as its officers, agents, employees and representatives and all other persons acting through or for them, from enforcing or

implementing Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended;

D. Awarding damages and "just compensation" to the Intervening Plaintiffs in amounts to which they are found to be entitled at trial;

E. Awarding Intervening Plaintiffs their reasonable attorney fees and costs incurred herein pursuant to 42 U.S.C.1988; and

F. Entering such other and further relief in law and in equity that this Court deems just and proper in the circumstances.

Dated: December _____, 2003

Respectfully submitted,

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VERIFICATION OF ROBERT HOLLIS

I, Robert Hollis, being a corporate representative of Taylor Boulevard Theatre, Inc., Blue Movies, Inc., and Win, Place & Show Bar, Inc., do hereby certify under penalty of perjury that the facts as set forth in the Intervening Plaintiffs' Verified Complaint for Declaratory Relief, Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Attorney Fees, are true and correct the best of my knowledge, except in regard to matters assert upon information and belief.

STATE OF Kentucky)
)§§
COUNTY OF Jefferson)

Subscribed, sworn to and acknowledged before me by Robert Hollis, this 3rd day of Dec., 2003, to be his free act and deed.

/s/ Marcella L. Goodin
Notary Public, State at Large

My Commission Expires: 6/30/04

Plaintiff's address:

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

APPEAL NO.'s: 2005-CA-90-MR;
2005-CA-92-MR; 2005-CA-113-MR

RELATED APPEALS
2005-CA-85-MR; 2005-CA-91-MR;
2005-CA-100-MR; 2005-CA-176-MR

[Filed March 3, 2006]

KENTUCKY RESTAURANT CONCEPTS, INC. d/b/a PT'S SHOW CLUB, BLUE MOVIES, INC., d/b/a LOVE BOUTIQUE, *et al.*,	)
Plaintiffs-Appellants/Cross-Appellees,	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT,	)
Defendant-Appellee/Cross-Appellant.	)

Appeal from the Jefferson Circuit Court
Action No. 04-CI-01967

BRIEF OF APPELLANTS/CROSS-APPELLEES (APPENDICES "A" - "P")

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CERTIFICATE OF REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail Registered with postage prepaid on March 3, 2006: Hon. Judge Stephen P. Ryan, 700 W. Jefferson St., Louisville, KY 40202; Hon. N. Scott Lilly, Hon. Winston King, and Hon. William O'Brien, 531 Court Place, Ste. 1001, Louisville, KY 40202; Hon. E. Patrick Mulvihill, 3226 Bremer Way, Louisville, KY 40213; Hon. Gregory Stumbo, 1024 Capitol Center Dr., Frankfort, KY 40601; Hon. Scott Bergthold, 8052 Standifer Gap Road, Suite C, Chattanooga, TN 37421. The undersigned does also certify that the record on appeal was not withdrawn from the Jefferson Circuit Court.

/s/ Frank Mascagni III
Frank Mascagni III

INTRODUCTION

Plaintiffs appeal from a circuit court's ruling on a challenge brought under the Kentucky Constitution against a Louisville/Jefferson County Metro Government ordinance that provides for the licensing and regulation of "adult entertainment establishments," where the ruling: 1) vacated a previously entered restraining order; 2) denied Plaintiffs' motion for a temporary injunction; and 3) with two small exceptions, granted the Defendant's motion for summary judgment.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the importance of the constitutional claims at issue in this case, many of which involve matters of first impression related to the interpretation of provisions of the Kentucky Constitution, Plaintiffs respectfully request that oral arguments be heard. Oral argument is particularly warranted because of the inability of the United States Supreme Court to articulate clear and usable standards for the application of analogous provisions of the Federal Constitution in regard to the matters at issue here. Plaintiffs respectfully request 45 minutes to present their arguments in light of: 1) the number and complexity of the constitutional issues that are raised in this action; and 2) the business diversity of Plaintiffs creating certain conflicts of interest among them in regard to the constitutional issues raised here, which will necessitate more than one attorney arguing the positions of the various Plaintiffs.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

STATEMENT OF THE CASE 1

ARGUMENT 5

I. THE CIRCUIT COURT ERRED IN GRANTING NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION 5

A. STANDARD OF REVIEW 5

Gosney v. Glenn, 163 S.W.3d 894 (Ky. Ct. App. 2005) 6

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364 (Ky. 2005) 5, 6

Lucchese v. Sparks-Malone, P.L.L.C., 44 S.W.3d 816 (Ky. App. 2001) 6

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION 6

Alexander v. City of St. Paul, 227 N.W.2d 370 (Minn. 1975) 13

Alexander v. United States,
509 U.S. 544 (1993) 14

Arcara v. Cloud Books, Inc., 478 U.S. 697 . . . 14

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 14

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 6

City of Colorado Springs v. 2354, Inc.,
896 P.2d 272 (Colo. 1995) 13

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 14

Commonwealth v. Brandenburg,
114 S .W.3d 830 (Ky. 2003) 7

Commonwealth v. Campbell,
117 S.W. 383 (Ky. Ct. App. 1909) 11

Commonwealth v. Wasson,
842 S.W.2d 487 (Ky. 1992) 7,8

Dean v. Commonwealth,
777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* 7

Genusa [v. City of Peoria,
619 F.2d 1203 (7th Cir. 1980)] 14

Hodgkin v. Kentucky Chamber of Commerce,
246 S.W.2d 1014 (Ky. Ct. App. 1952) 7,8

James v. Hines,
63 S.W.3d 602 (Ky. Ct. App. 1998) 6,13

Long v. 130 Market St. Gift & Novelty of Johnstown,
440 A.2d 517 (Pa. Super. Ct.1982) 9,10,11

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 14

Near v. Minnesota, 283 U.S. 697 (1931) 6

Nightclubs, Inc. v. City of Paducah,
202 F.3d 884 (6th Cir. 2000) 6

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 9,13

Perrine v. Municipal Court,
488 P.2d 648 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972) 13

Rose v. Council for Better Educ., Inc.,
790 S.W.2d 186 (Ky. 1989) 7

Schultz v. City of Cumberland,
228 F.3d 831 (7th Cir. 2000) 13,14

Seattle v. Bittner,
505 P.2d 126 (Wash. 1973) 13

Simon & Schuster, Inc. v. Crime Victims Bd.,
502 U.S. 105 (1991) 14

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546, 553 (1975) 6

Tennessee v. Marshall,
859 S.W.2d 289, 293 (Tenn. 1993) 11

The Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408, 417-18 (Ky. 2005) 6

The Kentucky Bill of Rights: A Bicentennial Celebration, Kentucky Law Journal, Vol. 80: 1991-92, No. 1 8

Robert F. Williams: ***The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism***, 62 Temp. L. Rev. 541 (1989) 8

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308, 317 (1980) 6,14

William Goldman Theatres, Inc. v. Dana,
173 A.2d 59 (Pa. 1961) 10

Yeoman v. Commonwealth,
983 S.W.2d 459, 474 (Ky. 1998) 7,8

C. THE LICENSING FEES ARE UNCONSTITUTIONAL 15

Broadway Books, Inc. v. Roberts,
642 F.Supp. 486 (E.D. Tenn. 1986) 15,16

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 15

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672 (W.D. Ky. 2002) 16

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 15,16

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY 16

Artistic Entm't, Inc. v. City of Warner Robins, 331 F.3d 1196 (11th Cir. 2003), cert. denied, 541 U.S. 988 (2004) 17

City of Chicago Heights v. Public Service Co., 97 N.E.2d 807 (Ill. 1951) 17

Ellwest Stereo Theater, Inc. v. Boner, 718 F.Supp. 1553 (M.D. Tenn. 1989) 17

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED GOVERNMENTAL BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION 17

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 18,19,20,21

Bellanca v. New York State Liquor Auth., 429 N.E.2d 765 (N.Y. 1981), *cert. denied* 456 U.S. 1006 (1982) 20

City of Erie v. Pap's, A.M., 529 U.S. 277 (2000) ("**Pap's II**") 18,20,21

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 18,22

City of Nyssa v. Dufloth,
121 P.3d 639 (Or. 2005) 20,21

Hendricks v. Commonwealth,
865 S.W.2d 332 (Ky. 1993) 21,22

Marks v. United States,
430 U.S. 188 (1977) 19

Mendoza v. Licensing Board of Fall River,
827 N.E.2d 180 (Mass. 2005) 20

Pap's A.M. v. City of Erie,
719 A.2d 273 (Pa. 1998) 20

Pap's A.M. v. City of Erie,
812 A.2d 591 (Pa. 2002) 20,21,22,23

Mickens v. Kodiak,
640 P.2d 818 (Alaska 1982) 20

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 20,

Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't,
60 S.W.3d 572 (Ky. Ct. App. 2001) 21,22

Triplett Grille, Inc. v. City of Akron,
40 F.3d 129 (6th Cir. 1994) 19

United States v. O'Brien,
391 U.S. 367 (1968) 19,21,22

F. THE CIRCUIT COURT ERRED IN FINDING THE HOURS OF OPERATION PROVISION CONSTITUTIONALLY VALID 23

Alameda Books, Inc. v. City of Los Angeles, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) 29,30

American Heritage College Dictionary, Third Edition, p. 687 26

Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003) 24

Buckley v. Valeo, 424 U.S. 1 (1976) 26

Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) 23,25

City of Erie v. Pap's, A.M., 529 U.S. 277 (2000) (**"Pap's II"**) 23,29,30

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 23,25,26,29

DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) 27

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 27

G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) 23,25

Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) 27

Marks v. United States, 430 U.S. 188 (1977) .. 23

Merriam-Webster's Collegiate Dictionary, Tenth Edition, p. 587 26

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) ... 23,24

People v. Glaze, 614 P.2d 291 (Cal. 1980) 26

Playboy Entertainment Group. Inc. v. United States, 30 F.Supp.2d 702 (D. Del. 1998) 29

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 29,30

SOB, Inc., v. County of Benton, 317 F.3d 856 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) 23,25

Simon & Schuster, Inc. v. Crime Victims Bd., 502 U.S. 105 (1991) 27

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180 (1997) 27

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 28,29

United States v. O'Brien, 391 U.S. 367 (1968) 24,26

United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) 27

Webster's II New Riverside Dictionary, Revised Edition, p. 351 26

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL . 30

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 32

Boyle v. Campbell, Ky., 450 S.W.2d 265 (1970) 32

City of Ashland v. Kentucky Alcoholic Beverage Control Bd., 982 S.W. 2d 210 (Ky. Ct. App. 1998) 31

City of Erie v. Pap's, A.M., 529 U.S. 277 (2000) 30

Commonwealth v. Do, Inc., Ky., 674 S.W.2d 519 (1984) 31

G & V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994) 32,33

Keyshian v. Board of Regents,
385 U.S. 589 (1967) 32

Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't, 127 S.W.3d 647 (Ky. 2004) 31

Louisville v. Woods,
883 S.W.2d 881 (Ky. Ct. App. 1993) 32

Perry v. Sinderman, 408 U.S. 593 (1972) 33

Sherbert v. Verner, 374 U.S. 398 (1963) 33

Whitehead v. Estate of Bravard.,
719 S.W. 2d 720 (Ky. 1986) 31

II. THE CIRCUIT COURT ERRED IN UPHOLDING THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS AS THEY ARE INFIRM UNDER THE KENTUCKY CONSTITUTION 33

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION 33

City of Nyssa v. Dufloth,
121 P.3d 639 (Or. 2005) 33,34

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 34,35

2. THE ENTERTAINMENT BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION 35

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 36

Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, 274 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) 36

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672 (W.D. Ky. 2002) 36

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 35

3. THE ENTERTAINMENT BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY 37

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 37

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 38

Commonwealth v. Ashcraft, 691 S.W.2d 229 (Ky. Ct. App. 1985) 37

Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999) .....

DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997) 38

Freedman v. Maryland, 380 U.S. 51 (1965) .....

G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994)

J.L. Spoons, Inc. v. City of Brunswick, 49 F.Supp.2d 1032 (N.D. Ohio 1999) 39

United States v. O'Brien, 391 U.S. 367 (1968) 37

I. THE RESTRICTIONS CONTAINED IN CHAPTER 111 ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD 39

United States v. O'Brien, 391 U.S. 367 (1968) 39

II. THE CIRCUIT COURT ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES 40

Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) 41

Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999) 41

Craig v. Boren, 429 U.S. 190 (1976) 41

Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995) 41

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS 41

44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 42

Allgeyer v. State of La., 165 U.S. 578 (1897) .. 42

Cathy's Tap, Inc. v. Village of Mapleton, 65 F.Supp.2d 874 (C.D. Ill. 1999) 43

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 43

Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, 274 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) 42

Freedman v. Maryland, 380 U.S. 51 (1965) 42,43

G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994) . . 42

G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d. 631 (7th Cir. 2003) 43

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672 (W.D. Ky. 2002) 43

Lawrence v. Texas, 539 U.S. 558 (2003) 42

R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004) 43

T.K.'s Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994) 42

IV. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE 44

City of Erie v. Pap's, A.M., 529 U.S. 277 (2000) 44,45,47

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 45,47

Jameson v. Commonwealth,
No. 2003-CA-000967-DG, 2004-WL-1752597
(Ky. Ct. App. Aug. 6, 2004) 46

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 44

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER 47

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 47

Elrod v. Burns, 427 U.S. 347 (1976) 48

G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994) . . 48

Gannett Co., Inc. v. DePasquale,
443 U.S. 368 (1979) 48

Maupin v. Stansbury,
575 S.W.2d 695 (Ky. App. 1978) 48

CONCLUSION 48

STATEMENT OF THE CASE

Plaintiff Kentucky Restaurant Concepts, d/b/a *PT's* ("*PT's*"), operates a liquor-licensed establishment in Louisville which presents to the consenting adult public a variety of female exotic performance dance entertainment where entertainers are at times clothed, at times "topless," and at other times fully nude. *PT's* has been open for business since February, 1997, and it is licensed to remain open and serve alcoholic beverages until 4:00 a.m. Complaint, ¶ 10; Circuit Court Record ("R.") Vol. I, pp. 1-44.

Blue Movies, Inc., d/b/a *Love Boutique ("Blue Movies")*, operates a retail facility in Louisville that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. *Blue Movies* has operated in Louisville since 1982. Complaint, ¶ 11; R. Vol. I., pp. 1-44.

On March 1, 2004, Defendant Louisville/Jefferson County Metropolitan Government ("Metro") enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance;" a copy of which is found as Apx. B). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the

suspension and revocation of licenses for numerous reasons, including the fact that the license (§ 111.43); it requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and it provides for penalties for violating the Ordinance - - in addition to license suspension and/or revocation - - which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 nor more than $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

Plaintiffs filed suit on March 5, 2004, challenging the Ordinance on numerous state constitutional grounds. At the same time, they filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction. The bases of the constitutional attacks against Chapter 111 are set forth in Plaintiffs' complaint (R. Vol. I, pp. 1-44), and the matters at issue in the various motions which resulted in the dismissal of the lawsuit below are found in the Summary and Outline of Constitutional Challenges to Chapter 111. R. Vol. III, pp. 410-30; Apx. C.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. R.Vol. I, p. 52; Apx. D. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. R. Vol. III, pp. 358-61; Apx. H. Plaintiffs' Motion for Temporary Injunction was left pending.[2]

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[1] These various arguments can be discerned in detail from Plaintiffs' Brief in Support of Motion for Temporary Injunction ("Brief"), filed March 5, 2004; Plaintiffs' Response to Motion for Summary Judgment (R. Vol. III, pp. 433-49); and Plaintiffs' Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order ("Supp. Brief"), filed August 4, 2004.

[2] In June and July of 2004, the other Appellants/Counter-Appellees were granted permission to intervene as plaintiffs. Those businesses fell into two categories. First were Cam I, Inc., d/b/a *Preston Video*; Blue Sky Video, Inc.; Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*; Pure Pleasure Mega Center, LLC; American Pride VI, Inc., d/b/a Lion's Den Adult Superstore; Taylor Boulevard Theatre, Inc., d/b/a *Erotic*

Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89) while the case was in federal court (after Metro had filed a notice of removal but before the federal district court entered an order of remand), and then later filed a motion for summary judgment. R. Vol. II, pp. 148-241. The motion to dissolve was later "passed to the trial date." (Order, R. Vol. III, pp. 347-50; Apx. G). Pending before the circuit court were therefore: 1) Plaintiffs' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the

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Touch; and TBC, Inc., d/b/a *Metro Station*, which are all retail facilities that present, sell and rent to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. Second were Danny's Inc., d/b/a *Thorobred II*; Entertainment Enterprises, Inc., d/b/a *The Godfather*; Gold Coast, Inc., d/b/a *Thorobred III*; Hayes Entertainment, Inc., d/b/a *Thorobred IV*; LLL, Inc., d/b/a *Greenlight Lounge*; Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*; Riverview Entertainment, Inc., d/b/a *Thorobred VI*; South Dixie Entertainment, Inc., d/b/a *Thorobred VII*; Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; Teddy's Inc., d/b/a *Thorobred V*; Thorobred, Inc., d/b/a *Thorobred Lounge*; Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*; Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*, all of which are liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license) that present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude. All of these Plaintiffs and Intervenors are referred to hereinafter simply as "Plaintiffs."

restraining order; granting Defendant's motion for summary judgment as to all issues except for § 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Plaintiffs' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. R. Vol. VII, pp. 942-62; Apx. A. The circuit court granted virtually complete summary judgment to the Defendant: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

The circuit court denied a motion for stay pending appeal and, rather, stayed enforcement of Chapter 111 only long enough for the Plaintiffs to seek a stay from this Court. It further ordered the filing of a $25,000.00 bond from each Plaintiff and Intervenor for that short stay period. R. Vol. VII, pp. 1033-38. Upon application, this Court issued such a stay pending appeal and reduced the bond amount to $500.00 per Plaintiff. R. Vol. VII, pp. 1044-54. Other relevant facts and proceedings will be discussed below.

Plaintiffs all timely filed Notices of Appeal, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D).

STATE CONSTITUTIONAL PROVISIONS AT ISSUE

Ky. Const. § 1. "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . .Third: The right of seeking and pursuing their safety and happiness. Fourth: The right of freely communicating their thoughts and opinions. . . . Sixth: The right of assembling together in a peaceable manner for their common good. . . ."

Ky. Const. § 2. "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Ky. Const. § 8. ". . .Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

Ky. Const. § 14. "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Ky. Const. § 26. "To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION.

A. STANDARD OF REVIEW.

The standard of review regarding a grant of summary judgment is "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." **Horne v. Precision Cars of Lexington, Inc.**, 170 S.W.3d 364, 366 (Ky. 2005). "Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. In ruling on a motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion." **Id.** (citations omitted). And, "[t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue." **Lucchese v. Sparks-Malone, P.L.L.C.**, 44 S.W.3d 816, 817 (Ky. App. 2001). Finally, conclusions of law, which are the rulings at issue here, are subject to "independent *de novo* appellate determination." **Gosney v. Glenn**, 163 S.W.3d 894, 898 (Ky. Ct. App. 2005).

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION.

"A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." **Nightclubs, Inc. v. City of Paducah**, 202 F.3d 884, 889 (6th Cir. 2000), *citing* **Southeastern Promotions, Ltd. v. Conrad**, 420 U.S. 546, 553 (1975).[3] *See also* **Near v. Minnesota**, 283 U.S. 697, 713 (1931). Under federal jurisprudence, "[a]ny system of prior restraints of expression comes to this Court bearing a ***heavy presumption against its constitutional validity***." **Vance v. Universal Amusement Co., Inc.**, 445 U.S. 308, 317 (1980) (emphasis added), *quoting* **Bantam Books, Inc. v. Sullivan**, 372 U.S. 58, 70 (1963). This is all-the-more so with regard to the Kentucky Constitution. *Accord* **James v. Hines**, 63 S.W.3d 602, 606 (Ky. Ct. App. 1998), *appeal dismissed* ("Prior restraint on speech is ***presumptively unconstitutional***") (emphasis added).

First, Plaintiffs make the general observation that the Kentucky Supreme Court has often declared that the State Constitution affords broader protections than the Federal Constitution.[4] This is because:

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[3] Although Plaintiffs' claims below were predicated solely upon the Kentucky Constitution, they will cite extensively herein to federal precedent as state constitutional rights cannot fall below the minimum guarantees of individual rights under the United States Constitution. **The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.**, 163 S.W.3d 408, 417-18 (Ky. 2005).

[4] *See, e.g.*, **Commonwealth v. Brandenburg**, 114 S.W.3d 830, 835 (Ky. 2003) (court has right to "enhance the protections

> "Contrary to popular belief, the Bill of Rights in the United States Constitution represents neither the primary source nor the maximum guarantee of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution. . . . [W]hile there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical.
>
> * * *
>
> Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties ***significantly greater than the selective list of rights addressed by the Federal Bill of Rights***."

Commonwealth v. Wasson, 842 S.W.2d 487, 492, 494 (Ky. 1992) (invalidating the states sodomy law based on privacy grounds) (emphasis added).

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afforded the citizens of this Commonwealth by the Kentucky Constitution"); **Yeoman v. Commonwealth**, 983 S.W.2d 459, 474 (Ky. 1998) ("privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States Constitution"); **Dean v. Commonwealth**, 777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* (right of confrontation broader); and **Rose v. Council for Better Educ., Inc.**, 790 S.W.2d 186 (Ky. 1989) (finding a fundamental right to an adequate public education, even though the United States Supreme Court had rejected just such an argument).

Here, Ky. Const. §§ 1, 2, 8 and 26 contain language far broader than the First Amendment. Indeed, the Kentucky Constitution protects the freedom of speech and communication in not one, but ***two*** separate provisions. Ky. Const. §§ 1(Fourth) and 8. Then, there is the broad limitation upon government as set forth in Ky. Const. § 26. This demonstrates that Kentucky has indeed chosen the broadest protections for expression that are possible. Moreover, this Court should not consider the textual difference between the Federal and State Constitutions to be insignificant. Indeed, "each word in the Constitution should be given meaning and effect. . . ." **Hodgkin v. Kentucky Chamber of Commerce**, 246 S.W.2d 1014, 1016 (Ky. Ct. App. 1952). This admonition should be kept in mind when considering the precedent below which discusses the literal differences between the federal and state constitutional provisions at issue.

Second, and more specifically, the *Pennsylvania* Constitution has been interpreted to afford extremely broad protections against prior restraints. This is important because:

> "In an article in the Kentucky Law Journal, Vol. 80: 1991-92, No. 1, *the Kentucky Bill of Rights: A Bicentennial Celebration*, by Gormley and Hartman, the authors attribute the source of much of our original Kentucky Bill of Rights to the then recently enacted Pennsylvania counterpart:
>
> > 'A comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, ***demonstrates unequivocally that the***

> ***original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790.'***
>
> The evidence supporting this proposition is carefully documented in the article."

Wasson, 842 S.W.2d at 492 (emphasis added).

Accordingly, as succinctly stated by the State Supreme Court:

> "***Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own.***"

Id. at 498 (emphasis added).[5]

At the time of adoption of the Kentucky Constitution, as well as the federal constitution and the constitution of the State of Pennsylvania, there were two philosophical approaches to the freedoms of speech and the press. The more limited was the Blackstone view that freedom of speech meant only

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[5] *See also* **Yeoman**, 983 S.W.2d at 473 ("decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are ***very persuasive*** to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives") (emphasis added); and Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541 (1989) (influence of Pennsylvania's Constitution is remarkable).

freedom from prior restraint. Under Blackstone's view, there could, however, be punishment for the "abuse" of that liberty. The other was a natural rights philosophy advanced in the works of John Locke, which taught that freedom of speech was an "inalienable" natural right that was always retained by the individual, limited only by the fundamental rights of others. A detailed and scholarly discussion of these competing theories is found in the very recent decision of the Oregon Supreme Court in **Oregon v. Ciancanelli**, 121 P.3d 613, 620 (Or. 2005).

It is beyond question that Kentucky has chosen the broadest protections possible by *blending* these two philosophical approaches into the State Constitution. Certainly, Ky. Const. § 1 contains natural rights attributes (its refers to the "***inalienable*** rights" of men to "freely communicate their thoughts and opinions" (emphasis added)). In addition, in also adopting a Blackstonian approach to these liberties, the Framers drafted Ky. Const. § 8 to protect the "free and full" right to speak, write and print "on any subject," while holding individuals "responsible for the abuse of that liberty."

Similarly, it is clear that the framers of the Pennsylvania constitution chose broad protections against prior restraints as well. In **Long v. 130 Market St. Gift & Novelty of Johnstown**, 440 A.2d 517 (Pa. Super. Ct.1982), the Superior Court of Pennsylvania noted that Blackstone's approach had become part of the "bedrock of Pennsylvania's constitutional system," and that under their state constitution, there were two distinct elements to the right of freedom of expression.

> "The first, ***arguably an absolute right,*** guarantees to each citizen the freedom to make public whatever he may choose. ***The prohibition against the prior restraint of publication serves to protect the sanctity of this right.***"[6]

Id. at 525 (emphasis added).

The Pennsylvania Supreme Court concurs in these comments. In **William Goldman Theatres, Inc. v. Dana**, 173 A.2d 59 (Pa. 1961), the High Court, in addressing the interpretation of the Pennsylvania constitutional right of free expression as a matter of first impression,[7] succinctly held that "it is clear enough that what it was designed to do was to ***prohibit the imposition of prior restraints upon the communication of thoughts and opinions***,

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[6] The second distinct element to the right of freedom of expression under the Pennsylvania and Kentucky constitutions is the responsibility "for the abuse of that liberty." The court in **Long** further noted that "[i]t would seem that the right to ***trial by jury . . . protects the sanctity of this more limited right.***" **Long**, 440 A.2d at 525 (emphasis added). However, there is no right to trial by jury with regard to the criminal disability provisions of Chapter 111 further discussed, *infra*, which can effectuate an absolute prior restraint upon expression. Rather, the Director, and not a jury, makes the decision that an individual or business is precluded from engaging in protected expression in the Louisville/Jefferson County area. Because the Ordinance does not require a determination by jury of penalties under Chapter 111 (including license suspension and/or revocation), the Ordinance is constitutionally infirm for this additional reason.

[7] As will be discussed further herein, that provision served as the basis for the rights found in Ky. Const. § 8.

leaving the utterer liable ***only*** for the abuse of the privilege." **Id**. at 62 (emphasis added). In discussing the renowned Blackstone Commentaries and the prohibition against prior restraints, the Pennsylvania Supreme Court further observed that what Blackstone had recognized as the law of England came to be "an established constitutional right in Pennsylvania as to both speech and press. . . ."

Accordingly, the Pennsylvania courts have acknowledged the "***arguably . . . absolute right***" to be free from prior restraints. This Court should recognize and indeed follow this "uniquely persuasively" precedent from the State of Pennsylvania.[8] *See also* **Commonwealth v. Campbell**, 117 S.W. 383, 385-86 (Ky. Ct. App. 1909) (this Court following the Blackstone approach in differentiating between absolute and relative rights).

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[8] Similarly, Tennessee, whose state constitution was also borrowed "***in virtually identical form***" from the Pennsylvania constitution, has also recognized the broad prohibitions against prior restraints (an "arguably absolute right") by directly and liberally quoting from **Long** in **Tennessee v. Marshall**, 859 S.W.2d 289, 293 (Tenn. 1993). That court further observed, in adopting the Pennsylvania approach, that "[t]here is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee's Constitutional Convention in 1796 intended, when they adopted, ***verbatim***, the language that was contained in Article 9, Section 7 of the Pennsylvania Constitution of 1790, ***that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.***" **Id.** at 294 (emphasis added).

Therefore, because Chapter 111 is clearly a prior restraint (in that no one can engage in the defined conduct within the county without prior governmental approval from the Director), it is invalid in-and-of itself under the plain language of the Kentucky Constitution. Yet, an additional facet of the Ordinance further makes this point.

In order to obtain an adult entertainment establishment license, each principal owner,[9] officer, director, general partner, and "each other person who will participate directly in decisions relating to management of the business" must be identified in the application and must list thereon all convictions for "specified criminal activities as defined in this Chapter. . . ." § 111.36(B)(2)(b) and (6). In fact, all such persons must ***sign*** the application for a business license "***as the applicant*** . . . ." § 111.36(B)(2)(b) (emphasis added).

An application for an adult entertainment establishment license is to be denied if the "applicant" has been convicted of a "specified criminal activity. . . ." § 111.38(A)(4). These include the crimes of rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and even offenses relating to controlled substances. § 111.02. Such convictions preclude licensing for two years from the date of a conviction for a misdemeanor offense; five years from the date of a felony conviction; and five years from the date of the last conviction of two or

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[9] A "principal owner" is defined as a person owning 20% or more of a business. § 111.02.

more misdemeanor offenses occurring within any twenty-four month period. § 111.02.

In addition, each and every person employed at an adult entertainment establishment must obtain an employee license prior to working -- even janitors! *See generally* § 111.40(D) and § 111.42(A). An employee license must also be denied if the Director determines that the employee applicant has been convicted of a "specified criminal activity." § 111.42(B). Interestingly, while this restriction parrots the requirement for club licenses, employee applicants are ***not*** – for whatever reason – obligated to disclose any such convictions on their applications. *See, e.g.*, § 111.42(A)(1)-(7).

Any license may be suspended if the licensee "knowingly or recklessly violated or is not in compliance with any section of this chapter. . . ." § 111.43(A). A license may be revoked if the licensee "knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period," § 111.43(B), or for a single instance of certain criminal conduct. § 111.43(C). The fact that a conviction is being appealed "shall have no effect on the revocation of the license. . . ." § 111.43(D). A license revocation is effective for a period of ***one year***. § 111.43(E).

All of these sections of Chapter 111, in combination, will be referred to hereinafter as the "***criminal disability provisions***" of the Ordinance.

The circuit court upheld these restrictions, R. Vol. VII, pp. 942-62; Apx. A, pp. 6-7, yet also concluded that it believed that Plaintiffs did not have

standing to challenge them.[10] **Id.** at 7. However, the criminal disability provisions are unquestionably prior restraints upon expression, and accordingly fail to pass muster under the Kentucky Constitution.

First, since prior restraints should not be permitted ***at all*** under the Kentucky Constitution, these provisions are impermissible and invalid. They disenfranchise certain individuals and businesses from engaging in expression-related activities, and therefore unquestionably effectuate an impermissible prior restraint. Indeed, supreme courts of a number of states have come to the conclusion that these types of criminal disability provisions are constitutionally infirm.[11]

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[10] Plaintiffs certainly have standing because they are required to pay the application fees which are used to defray the costs of the criminal background checks which facilitate administration of the criminal disability provisions. In addition, all "applicants" must forego their privacy rights and provide certain personal information and submit to a criminal background check.

[11] *See, e.g.*, **Perrine v. Municipal Court**, 488 P.2d 648, 652 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972) (ordinance unconstitutional as no showing had been made that persons convicted of specifically articulated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); **City of Colorado Springs v. 2354, Inc.**, 896 P.2d 272, 288-89 (Colo. 1995); **Seattle v. Bittner**, 505 P.2d 126, 131 (Wash. 1973); and **Alexander v. City of St. Paul**, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of a criminal disability provision which effectuated a prior restraint could be overcome only upon a showing that the continued operation of a business would present a "clear and present danger" of a substantive evil). *Compare* **James**, 63 S.W.3d at 606

Second, there is also federal precedent that establishes the infirmity of such restrictions. Most telling is the recent Seventh Circuit decision in **Schultz v. City of Cumberland**, 228 F.3d 831 (7th Cir. 2000), where that Circuit succinctly concluded:

> "The First Amendment also does not allow licensing provisions based on criminal history that 'totally prohibit certain classes of persons' from First Amendment expression . . . . 'We know of no doctrine that permits the state to deny to a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense.'. . . Accordingly, the Ordinance disqualification provisions . . . for operator and employee licensing are unconstitutional as well . . . . Like the disqualification provisions struck down as unconstitutional in **Genusa [v. City of Peoria**, 619 F.2d 1203 (7th Cir. 1980)] these license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***."[12]

("Prior restraint must be supported by findings that a 'clear and present danger of actual prejudice or an imminent threat' to the defendant is present").

[12] Consequently, criminal disability provisions such as are found in Chapter 111 ***cannot*** be justified upon a concern of "adverse

secondary effects" as is the stated purpose of this Ordinance. *See* further discussion in Section IV, *infra*. While the United States Supreme Court has never directly ruled on the validity of these types of disability provisions, a number of its decisions, and in particular those dealing with "adult" entertainment, certainly imply that they would be ruled unconstitutional. *See, e.g.*, **Arcara v. Cloud Books, Inc.**, 478 U.S. 697, 705 n.2 (Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint since respondents were "***free to carry on their bookselling business at another location***," which would not be the case here where the disabled individuals and businesses are precluded from engaging in protected activities anywhere in the County) (emphasis added); **Alexander v. United States**, 509 U.S. 544, 551 (1993) (Court concluded that the forfeiture provisions of the federal RICO statute did not violate the First Amendment as it "impose[d] no legal impediment to--no prior restraint on--petitioner's ability to engage in any expressive activity he chooses" (clarification added) whereas Chapter 111 violates this doctrine by imposing an absolute "legal impediment" to constitutionally protected expressive conduct); and **City of Los Angeles v. Alameda Books, Inc.**, 535 U.S. 425, 434-42 (2002) (plurality) (Justice Kennedy, in his critical concurring opinion (discussed, *infra*), observed that a municipality may not attempt to address a concern of secondary effects by "suppressing the speech itself." To be constitutional, the law must instead "leave the quantity and accessibility of speech substantially undiminished"). *See also* **Vance**, 445 U.S. at 317 (Prohibition of the future exhibition of films previously found to be obscene found unconstitutional as the future conduct was protected by the First Amendment); **Madsen v. Women's Health Ctr., Inc.**, 512 U.S. 753 (1994) (Previous misconduct or prior illegal activity by anti-abortion protesters could not serve as a basis to deprive them of their right to engage in current and future First Amendment activities); **Simon & Schuster, Inc. v. Crime Victims Bd.**, 502 U.S. 105 (1991) (Individuals convicted of heinous crimes, such as murder, could not be deprived of their First Amendment rights to author, publish, and receive royalties from books describing their criminal activities); and **Ashcroft v. Free Speech Coalition**, 535 U.S.

228 F.3d at 852-53 (emphasis added and clarification, citations omitted).

Here, although the preambles to Chapter 111 do not articulate any reason for engrafting the criminal disability provisions on to the Ordinance (a constitutional failing in-and-of-itself), it is clear that the only basis for these prohibitions could be the conclusion that people who were convicted of crimes in the past would be more likely to engage in such conduct in the future. As is aptly demonstrated above, however, Metro should not be permitted to effectuate such impermissible prior restraints.

C. THE LICENSING FEES ARE UNCONSTITUTIONAL.

The annual fee for an adult entertainment establishment license is $1,000.00. § 111.41. For an employee license, it is $25.00 per year. § 111.42(B). It is clear that the purpose of these fees is, at least in part, to defray the costs of the ***background checks*** necessary to enforce the criminal disability provisions. *See, e.g.*, § 111.42(B) ("Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this Chapter"). Given that the criminal disability provisions are infirm for the reasons as set forth above, the license fees are unconstitutional as well.

234, 245(2002) ("[T]he prospect of crime" does not justify laws suppressing protected speech).

As a basic premise, a state may not impose a charge upon the exercise of a constitutional right. **Murdock v. Pennsylvania**, 319 U.S. 105, 113 (1943). Nevertheless, under federal analysis, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." **Broadway Books, Inc. v. Roberts**, 642 F.Supp. 486, 493 (E.D. Tenn. 1986).[13] The fee should be as minimal as necessary to meet the cost to the city. **Id.** The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is indeed as potent as the power of censorship." **Murdock**, 319 U.S. at 113 (clarification added).

The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme ***lies with the licensing authority***. *See, e.g.*,

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[13] Whether municipalities can any longer impose a particular licensing fee under federal jurisprudence only against "adult" businesses is now open to significant question. *See* **Alameda Books**, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax"). As will be discussed, *infra*, Justice Kennedy's concurring opinion has been determined to be the constitutional "holding" of **Alameda Books**. In addition, the protections against prior restraints as embodied in the Kentucky Constitution would also seem to exclude the notion that the engagement in constitutionally protected activities can be made contingent upon the payment of a fee. Accordingly, the licensing fees as set forth in the challenged Ordinance may be unconstitutional in-and-of themselves, irrespective of the other matters discussed in this subsection.

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down the old Louisville ordinance fees, the district court noted that the "principles governing whether a licensing fee is permissible are ***well-established*** . . ," and that the "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme") (emphasis added, citations omitted).

If the criminal disability provisions of the Ordinance are unconstitutional, so clearly then are the application/licensing fees, which are specifically predicated upon administering the criminal disability components of Chapter 111. While the circuit court found that Metro had substantiated the amount of these fees by way of affidavit (Apx. A, p. 6), the lower court decision was, of course, predicated upon the upholding of the criminal disability provisions. If they are infirm, all of the costs associated with administering those provisions – which are indeed the lion's share of the licensing fees – are similarly unjustified, which negates the permissibility of these fees.

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY.

Although Chapter 111 contains a severability provision (§ 111.98), the invalidity of the licensing scheme renders the ordinance invalid in its entirety. The district court decision in **Kentucky Restaurant Concepts,** is particularly illuminating as it involved

the predecessor adult entertainment establishment ordinance. The court there held that:

> "As a practical matter, however, partial operation of Chapter 111 post-severance is untenable. The Ordinance's basic purpose is to regulate sexually oriented businesses. Its primary method for doing so is its licensing and enforcement scheme. Although the Ordinance's substantive provisions are constitutional, they are actually but minor subsets of the broader licensing requirement. For example, enforcement of the "buffer zone" requirement presupposes that an entertainer has a license to dance and an establishment has a license to operate. If the City may not deny or revoke licenses - - the fundamental regulatory mechanism upon which the Ordinance is structured - - then enforcement of the Ordinance is impossible."

209 F. Supp.2d at 701. *Accord* **Artistic Entm't, Inc. v. City of Warner Robins**, 331 F.3d 1196, 1204 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). The same circumstances apply in the case at bar, and the circuit court should therefore have enjoined the enforcement of the entire Ordinance.

In addition, because the licensing fees are unconstitutional, the entire Ordinance must be enjoined. *See, e.g.*, **Ellwest Stereo Theater, Inc. v. Boner**, 718 F.Supp. 1553, 1574-75, and 1581-82 (M.D. Tenn. 1989) (invalidation of numerous provisions of an adult business licensing ordinance – including the fee provision – rendered it impossible to sever, thereby requiring the entire ordinance to be enjoined); and

City of Chicago Heights v. Public Service Co., 97 N.E.2d 807, 811 (Ill. 1951) (invalidation of licensing fees associated with an ordinance regulating the location and construction of poles, wires, and main electrical lines in streets and other public places rendered the entirety of the ordinance unconstitutional, as the impermissible fee provisions were not severable in that the duties imposed upon the municipal agency "must be performed without reimbursement to the City because the license and permit fees provided for are excessive and void"). Here, Metro certainly did not intend the ***County*** to pay for the costs of administering this Ordinance, and since the fee provisions are therefore infirm, so is the entirety of Chapter 111.

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED GOVERNMENTAL BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION.

Section 111.35(A) provides that it is a violation of the Chapter "for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, ***appear in a state of nudity, regardless of whether such public nudity is expressive in nature.***"[14] (Emphasis added). The

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[14] Plaintiffs do not challenge this provision in regard to non-expressive nudity, but rather merely assert that the ban on "expressive" nudity is unconstitutional. Non-expressive public nudity is already prohibited by law. *See* K.R.S. § 510.150(1) (a person is guilty of indecent exposure when he "intentionally

phrase "state of nudity" is basically defined as a person appearing in clothing of something ***less than*** pasties and a G-string. *See* § 111.02 ("NUDITY OR STATE OF NUDITY"[15]). Accordingly, under the Ordinance, entertainers must wear at least pasties and a G-string at all times. ***Under Chapter 111, then, there is to be no fully nude dancing, or even "topless" entertainment, within the county.***

This restriction, and indeed Chapter 111 in its entirety, was enacted upon a purported concern of the "adverse secondary effects" of adult entertainment establishments. § 111.01. While discussed in greater detail in Section IV, *infra*, this doctrine, and indeed the ability to preclude nude entertainment under federal jurisprudence, has been the subject of a rash of highly-fractured plurality opinions from the Supreme Court. *See* **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560 (1991) (three Member plurality concluding that an anti-nudity statute could be justified upon the morality of society); **City of Erie v. Pap's, A.M.**, 529 U.S. 277 (2000) ("**Pap's II**") (five Justices, in two opinions, concluding that an ordinance proscribing public nudity could be justified upon the adverse secondary effects of adult entertainment establishments, but with no majority of Justices agreeing upon the evidentiary

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exposes his genitals under circumstance in which he knows or should know that his conduct is likely to cause affront or alarm to a person eighteen (18) years of age or older").

[15] This is defined as the "showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a full opaque covering of any part of the nipple and areola."

standards to apply in such circumstances); and **City of Los Angeles v. Alameda Books, Inc.**, 535 U.S. 425 (2002) (fragmented Court discussing the evidentiary burden upon the government in order to substantiate a regulation enacted upon a purported concern of adverse secondary effects). These cases all concluded, however, that in the particular circumstances presented, the Court would apply an intermediate level of constitutional scrutiny pursuant to a four part test as set forth in **United States v. O'Brien**, 391 U.S. 367 (1968).[16]

In its opinion, the circuit court analyzed the constitutionality of Chapter 111 under the **O'Brien** standards. R. Vol. VII, pp. 942-62; Apx. A, p. 4. The court found that this test was the appropriate level of review for determining the constitutionality of the Ordinance "given its stated justification to decrease secondary effects." R. Vol. VII, pp. 942-62; Apx. A, p. 4. However, the Plaintiffs contend that secondary effects is not a permissible basis to reduce the level of constitutional scrutiny under the Kentucky Constitution, and that reference to Pennsylvania law is once again necessary in arriving at this conclusion.

In the years following **Barnes**, courts quickly observed the perplexing, and actually irreconcilable, nature of the various opinions of the Justices. In

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[16] That four-part test examines whether: 1) the regulation at issue is within the government's constitutional power; 2) the regulation furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. **O'Brien**, 391 U.S. at 377.

attempting to apply the rule of **Marks v. United States**, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'"), the Sixth Circuit observed that those standards were less helpful in a case where the opinions were so divergent, and the appellate court referred to its job as "reading the tea leaves of **Barnes**." **Triplett Grille, Inc. v. City of Akron**, 40 F.3d 129, 134 (6th Cir. 1994).

In 1998, the Pennsylvania Supreme Court was squarely faced with the **Barnes** dilemma in **Pap's A.M. v. City of Erie**, 719 A.2d 273 (Pa. 1998) ("**Pap's I**"). Finding **Barnes** "hopelessly fragmented" (**Pap's I**, 719 A.2d at 277), that court concluded that the anti-nudity ordinance at issue before it was subject to strict constitutional scrutiny and was unconstitutional ***under the First Amendment***. **Id.** at 278-280. The Supreme Court granted review and reversed in, as stated, yet another plurality decision. **Pap's II**, 529 U.S. 277. This was not, though, to be the final word of that case.

The Supreme Court remanded to the Pennsylvania Supreme Court for a determination of the plaintiffs' overbreadth and state constitutional claims. **Pap's II**, 529 U.S. at 286, 302. In its subsequent decision, reported as **Pap's A.M. v. City of Erie**, 812 A.2d 591, 613 (Pa. 2002) ("**Pap's III**"), ***the Supreme Court of Pennsylvania adjudicated the exact same issue facing this Court with regard to Chapter 111; that being whether an anti-nudity provision which impacts upon expressive entertainment is***

consistent with the state constitutional right of freedom of speech and expression. The Pennsylvania Supreme Court, with only a single dissent (on an evidentiary issue), concluded that it was not.[17] The decision in **Pap's III** is critical here because, as previously stated, ***the Pennsylvania Constitution served as the basis of the Kentucky Constitution.***

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[17] *Accord* **Mendoza v. Licensing Board of Fall River**, 827 N.E.2d 180 (Mass. 2005), where the Massachusetts Supreme Court recently ruled an anti-nudity ordinance unconstitutional, even in the face of the type of secondary effects "evidence" submitted with regard to the enactment of Chapter 111. **Id.** at 189 *n.* 13. That court observed that the focus on "secondary effects" evidence "seems a strong indicator that the ordinance is directed at the form of nudity common in adult entertainment." **Id.** The Massachusetts Supreme Court therefore concluded that the ordinance was unconstitutional as a ban on protected expression. **Id.** at 198-99. Equally as important, the High Court of Massachusetts noted that in exercising its independent judgment to "uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law," **id.** at 191, it was following prior decisions of other state supreme courts, including **Pap's III**, **Mickens v. Kodiak**, 640 P.2d 818, 821-23 (Alaska 1982); and **Bellanca v. New York State Liquor Auth.**, 429 N.E.2d 765 (N.Y. 1981), *cert. denied*, 456 U.S. 1006 (1982). *See also* **City of Nyssa v. Dufloth**, 121 P.3d 639 (Or. 2005), and **Oregon v. Ciancanelli**, 121 P.3d 613 (Or. 2005), where the Oregon Supreme Court, in applying their state constitutional right of freedom of expression (markedly similar to that at issue here and also similar to Pennsylvania right – **Ciancanelli**, 121 P.3d at 634-35) declined to analyze various restrictions of exotic performance dance entertainment under any form of intermediate scrutiny by rejecting a secondary effects justification for such provisions. *See* **Nyssa**, 121 P.3d at 644 (De Muniz, J., dissenting)). These two decisions are discussed in further detail in Section I(H)(1), *infra*.

Upon remand, the Pennsylvania Supreme Court concluded that the anti-nudity ordinance at issue there – ***predicated upon a supposed concern of "secondary effects"*** (as is Chapter 111) – violated Article 1, Section 7 of their state constitution. The court rejected the intermediate scrutiny standard of **O'Brien**, and held that it must apply strict scrutiny, requiring the city to "establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" **Pap's III**, 812 A.2d at 612.

The Pennsylvania Supreme Court noted that freedom of expression had a "robust constitutional history" in that state. **Id.** at 603-05. Probably most importantly, it stated that:

> "***As purely textural matter, Article I, § 7 is broader than the First Amendment*** in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the ***free communication of thoughts and opinions***, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. ***'Communication' is obviously broader than 'speech.'***"

Id. at 603 (emphasis added).

Certainly, the same is true here. Ky. Const. § 1 articulates that citizens are imbued with the right of "***freely communicating their thoughts and opinions***," and Ky. Const. § 8 protects the freedom to speak on "any subject." That is not to even mention the

broad protections afforded by Ky. Const. § 26. Consequently, the same rights should apply here.[18]

In addition, in particular regard to the highly fractured plurality opinion in **Alameda Books**, by which any "secondary effects" analysis under the Federal Constitution must be governed, the High Court of Pennsylvania observed: "It is also notable that the five Justices in the U.S. Supreme Court who agreed that the **O'Brien** test applied ***could not agree upon the precise evidentiary showing which***

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[18] Such a conclusion is not foreclosed by the decision in **Hendricks v. Commonwealth**, 865 S.W.2d 332 (Ky. 1993). There, the State Supreme Court upheld a municipal anti-nudity ordinance challenged by a nude dance establishment. **Hendricks** is not dispositive of this issue for three cogent reasons. First, it was decided before **Pap's II** and utilized the now-abandoned **Barnes** standard. Second, its makes no adjudication under the State Constitution, and contains no analysis, let alone even argument, of whether the protections under Ky. Const. § 8 are anything different than what are provided by the First Amendment. Third, and most importantly, **Hendricks** pre-dates, almost by a decade, the Pennsylvania Supreme Court decision in **Pap's III**, which has particular persuasive authority as referenced above because of the use of the Pennsylvania Constitution as the basis for the Constitution of the Commonwealth of Kentucky. For basically these same reasons, **Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't**, 60 S.W.3d 572 (Ky. Ct. App. 2001), is similarly inapplicable.

would be required to satisfy that test.[19] **Pap's III**, 812 A.2d at 609-10 (emphasis added).

Elaborating on this lack of guidance, the Pennsylvania Supreme Court held:

> "Although this Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, §7, doing so here is no easy matter, even if we were obliged or inclined to. The position of the decisive Supreme Court concurrence by Justice Scalia – a position rejected by seven other Justices on the High Court – that this ordinance does not raise a question of protected expression at all finds no support in our jurisprudence. Nor does the concurrence offer any illumination on the proper application of the **O'Brien** standard, since the concurrence would have sustained the ordinance on grounds that it did not implicate protected expression at all. Meanwhile, the five Justices who agreed that **O'Brien** should apply ***disagreed upon the application of that intermediate scrutiny test***.

Pap's III, 812 A.2d at 611 (emphasis added).

In light of this dilemma, this Court should heed the words of the High Court of Pennsylvania:

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[19] The circuit court below, however, never confronted this evidentiary dilemma or even the application of Pennsylvania precedent in this regard. Rather, it simply adopted the **O'Brien** standard as a justification to uphold these regulatory provisions and impliedly concluded that whatever evidentiary standard applied, it had been met.

> "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."

Pap's III, 812 A.2d at 611. ***Citizens of Kentucky are entitled to no less***.

This Court should therefore follow this additional "uniquely persuasive authority," and for the same reasons as are articulated by the Pennsylvania Supreme Court that the ordinance at issue in **Pap's III** failed muster under strict scrutiny (812 A.2d at 612-13), similarly conclude that Chapter 111 is constitutionally infirm pursuant to Ky. Const. §§ 1, 2, 8 and 26, and that the circuit court thus erred.

F. THE CIRCUIT COURT ERRED IN FINDING THE HOURS OF OPERATION AND "NO DIRECT PAYMENT" PROVISIONS CONSTITUTIONALLY VALID.

As amended, § 111.18 now precludes an adult entertainment establishment from remaining open for business "between the hours of 1:00 a.m. and 9:00 a.m. on any day." Accordingly, defined establishments (and, again, even those providing no true "adult" entertainment, such as cabarets where entertainers have to wear at least pasties and G-strings at all times) must remain closed and must refrain from engaging in constitutionally protected expressive activities for ***eight hours of each day***. That is ***one-***

third of each day; one-third of each week; and one-third of each year.

PT's is open for business from 11:00 a.m. to 4:00 a.m. Monday through Friday, 4:00 p.m. to 4:00 a.m. on Saturday, and 6:00 p.m. to 2:00 a.m. on Sunday. Affidavit of Brian Franson ("Franson Aff.") ¶ 16; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I. Mr. Franson, the Area Director of *PT's*, estimates that complying with the hours of operation restrictions as set forth in § 111.18 would result in an approximate reduction of twenty-two percent in the number of customers patronizing *PT's*; a thirty percent reduction in the number of dancers performing at the club; a thirty percent reduction in the number of dances performed; and a thirty-two percent reduction in the revenue generated by the establishment. Franson Aff., ¶ 19; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I.

Blue Movies operates, and has operated in the past, twenty-four hours a day, seven days a week. Affidavit of Robert Hollis, ¶'s 4-6; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. J. For a "24/7" establishment such as *Blue Movies*, the restrictions in the Ordinance represent a ***33.3% reduction*** in the number of hours that it can be open for business. In Mr. Hollis' estimation, complying with the hours of operation provision would result in a 30% reduction in the number of customers; the amount of expressive materials presented; and business revenues. ¶ 10; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. J.

The circuit court upheld the hours of operation provision set forth in § 111.18 predicated upon the conclusion of the Ninth Circuit in **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153

(9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004). R. Vol. VII, pp. 942-62, Apx. A, p. 18. Reliance on that decision, however, was erroneous for numerous reasons. First, **Center for Fair Public Policy** utilizes (or at least attempts to utilize) the **O'Brien** standard of intermediate scrutiny which is simply not applicable under the Kentucky Constitution. Indeed, the circuit court never explained why it had failed to undertake any independent analysis under the Constitution of the Commonwealth of Kentucky. Second, in light of the fractured nature of **Barnes**, **Pap's II**, and more importantly **Alameda Books**, it is not even clear how those **O'Brien** standards are supposed to be applied. And, again, the circuit court engaged in no discussion of the confusion surrounding, and the disputes in the lower federal courts concerning, application of the **O'Brien** elements, and in particular the "narrow tailoring" component thereof.

Because **Alameda Books** is in fact a plurality ruling, the lower federal courts have struggled to utilize the **Marks** standards in order to determine the constitutional "holding" of that decision. Most courts have concluded that the holding is represented by the

concurring opinion of Justice Kennedy.[20] Reference to his opinion is, therefore, necessary.

Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they ***cannot*** have the consequent effect of also reducing either speech or expression related activities, and must "***leave the quantity and accessibility of the speech substantially undiminished***." **Alameda**, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). As he succinctly stated, "***a city may not regulate the secondary effects of speech by suppressing the speech itself***." **Id.** (emphasis added).

Justice Kennedy also observes that a regulation can be consistent with the First Amendment "if it is ***likely*** to cause a ***significant decrease*** in secondary effects and a ***trivial decrease*** in the quantity of speech." **Id.** at 445 (Kennedy, J., concurring) (emphasis added). He summed up his analysis as follows:

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[20] *See, e.g.*, **Ben's Bar, Inc. v. Village of Somerset**, 316 F.3d 702, 721-22 (7th Cir. 2003) (regarding ordinance prohibiting the sale, use or consumption of alcohol on the premises of "Sexually Oriented Businesses," such as is the case here – *see* Section I(G), *infra*); **SOB, Inc., v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) (regarding a public indecency ordinance); **Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County**, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (Justice Kennedy's concurring opinion applied to both zoning and public nudity ordinances); and **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d 631, 637-38 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (Justice Kennedy's concurrence applying to an alcohol prohibition in places where nude dancing occurs, and to a dancer/patron "buffer zone").

> "[A] city ***mus' advance some basis to show*** that its regulation has the ***purpose and effect*** of ***suppressing secondary effects***, while leaving the ***quantity*** and ***accessibility*** of ***speech substantially intact***. The ordinance may identify the speech based on content, but only as a short hand for identifying the secondary effects outside. ***A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with*** [the four Justice dissent authored by] Justice SOUTER. See *post*, at 1746. The rationale of the ordinance must be that it will suppress secondary effects -- ***and not by suppressing speech***.

Id. at 449–50 (Kennedy, J., concurring) (emphasis and clarification added). Equally as important, he further stated that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." **Id.** at 450.

Irrespective of this, the one court that seems to marginalize Justice Kennedy's concurring opinion is indeed the Ninth Circuit decision in **Center for Fair Public Policy**; the ruling relied upon by the circuit court below. That opinion, however, is a mere two-two-one decision, and even under federal jurisprudence seems to be at odds with the general doctrine of narrow tailoring under intermediate scrutiny.

First, as noted by the dissent in **Center for Fair Public Policy**, if, as all of the other circuits agree, Justice Kennedy's concurring opinion *is* in fact the holding of **Alameda Books**, an hours of operation provision is the ***quintessential*** violation of those

concerns. *See* 336 F.3d at 1172 (Canby, J., dissenting). Second, Justice Kennedy's concurring opinion does no more than truly operationalize the fourth prong of **O'Brien**, which requires that the "incidental" restriction on First Amendment freedoms be "no greater than is ***essential***" to the furtherance of the governmental interest. 391 U.S. at 377. The word "incidental" is generally defined to have two separate components; the effect must be both "***indirect***," and "***minimal***."[21] If the impact is not "indirect," or, more importantly, if it is not "minimal," the regulation fails muster for not being sufficiently narrowly tailored. This is, indeed, all that Justice Kennedy advocates. Given the affidavits of Brian Franson and Robert Hollis, as acknowledged in the circuit court's ruling (R. Vol. VII, pp. 942-62; Apx. A, p. 17), the effect upon expression is neither ***minimal*** nor ***indirect***, and the Plaintiffs' challenges to these draconian provisions should not, therefore, have been summarily dismissed.

Third, economic impact is certainly one of the effects that a court must look at when determining the constitutionality of a law that impacts upon First

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[21] *See, e.g.*, **Webster's II New Riverside Dictionary**, Revised Edition, p. 351 ("2. Subordinate: ***minor***"); **American Heritage College Dictionary**, Third Edition, p. 687 ("1. Occurring or likely to occur as an ***unpredictable*** or ***minor*** accompaniment. 2. Of a ***minor, casual, or subordinate nature***"); **Merriam-Webster's Collegiate Dictionary**, Tenth Edition, p. 587 ("1: being likely to ensue as a chance or ***minor consequence***; 2: ***occurring merely by chance or without intention or calculation***") (emphasis added). *See also* **People v. Glaze**, 614 P.2d 291, 295 (Cal. 1980) (noting that an ordinance which prohibited the operation of film arcades between the hours of 2:00 a.m. and 9:00 a.m. involves "more than the incidental infringement of freedom of expression").

Amendment rights (and, accordingly, state constitutional rights as well). And, for the same reason, the "no payment" provision contained in § 111.35(C) is similarly infirm. As the Supreme Court stated in **Buckley v. Valeo**, 424 U.S. 1, 66 n.76 (1976), "money" is "a necessary and integral part of many, perhaps most, forms of communication." Succinctly put by the Fourth Circuit, "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials." **Hart Book Stores, Inc. v. Edmisten**, 612 F.2d 821, 527 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).[22]

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[22] *See also* **United States v. Nat'l Treasury Employees Union**, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "[b]y denying respondents that incentive, the honoraria ban induces them to curtail their expression," and therefore "unquestionably imposes a significant burden on expressive activity"); **Turner Broadcasting System, Inc. v. F.C.C.**, 520 U.S. 180, 208 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable T.V. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); **Erznoznik v. City of Jacksonville**, 422 U.S. 205, 211 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity," that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs, that this could result in individuals being unable to see such films, and that the ordinance was therefore

Just as government may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression into oblivion. The two most relevant cases on this issue are as follows, and well-illustrate the unconstitutional nature of this Ordinance provision.

In **DiMa Corp. v. Town of Hallie**, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Seventh Circuit upheld an hours of operation restriction that forced an adult business that had previously been open twenty-four hours a day (just like *Blue Movies*) to close from 2:00 a.m. to 8:00 a.m. Monday through Friday, from 3:00 a.m. to 8:00 a.m. on Saturday, and from 3:00 a.m. to noon on Sunday. But while upholding these less restrictive closing hour rules (44 hours, or "about ***one-quarter*** of the hours of the week" (**id**. at 826), as opposed to 56 hours here, or ***one-third*** of the time), the Seventh Circuit noted that "we have no reason to believe that this is a significant impairment of [the Plaintiffs'] business. DiMa has not created a record to show what sort of impact this limitation would have on its business. That is, we don't know how much revenue [the Plaintiff] takes in during the hours that are subject to the regulations. . . ." **Id.** at 831. (Clarification added). In contrast here, the evidence that the circuit court had in front of it clearly

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unconstitutional in that it was a "restraint on free expression"); and **Simon & Schuster, Inc.**, 502 U.S. at 116 (the Supreme Court invalidated a law that took the profits of books written by convicted criminals by noting that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

showed the "significant impairment[23]" that the Plaintiffs' businesses would suffer if forced to close their doors during the hours as set forth in the Ordinance.

More importantly, the U.S. Supreme Court has specifically addressed the constitutional ramifications of laws which seek to regulate the times during which "adult" entertainment may be presented. In **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803 (2000), the Court found an hours restriction on erotic cable TV broadcasting unconstitutional because of its perceived negative effect upon the economic viability of *Playboy*. The Court struck down the law because it restricted the ability of the *Playboy* channel to broadcast at certain hours of the day (analogous to the circumstances here), with the result being that there was a "significant restriction of communication, ***with a corresponding reduction in Playboy's revenues***." **Id.** at 809 (emphasis added).

Specifically, the Court noted that there would be a 30 to 50 percent reduction in viewing, with a lesser reduction of revenues. **Id.** at 812. While the district court there below had noted that the effect of the regulations on Playboy was "primarily economic," chiefly a mere ***15%*** decline in revenues, it further

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[23] It is interesting to note that the preambles to the Ordinance, in a conclusory fashion, observe that the hours of operation restrictions will have community benefits "without significantly interfering with the availability of adult entertainment." § 111.02(H). Certainly, this evidence establishes that the preamble is incorrect. And, if the preamble is the constitutional justification for this provision, the fact that it is found to be untruthful establishes the infirmity of this Ordinance section.

observed that this impact served as a ***"quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers."*** **Playboy Entertainment Group. Inc. v. United States**, 30 F.Supp.2d 702, 711 (D. Del. 1998) (emphasis added). Compare this to the estimated declines here, and in particular the reduction in customers and the engagement in expressive activities, and it is clear that according to the standards of **Playboy** and as subsequently modified by Justice Kennedy's concurrence in **Alameda Books**, this impact is sufficiently severe to cause a First Amendment violation, and therefore a violation under the Kentucky Constitution as well.

Fourth, even the plurality opinion authored by Justice O'Connor in **Pap's II** notes that a significant constitutional infringement would raise the level of constitutional scrutiny and shift the presumption to be against constitutional validity. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." 529 U.S. at 294. The intrusions here are, however, not *de minimis*.

Fifth, the fact that the fractured decision in **Alameda Books** has modified the secondary effects doctrine as first articulated by the Supreme Court in **Renton v. Playtime Theatres, Inc.**, 475 U.S. 41 (1986), is demonstrated no better than by a recent decision from the very federal district court which is continuing the Alameda Books saga following remand from the Supreme Court. In **Alameda Books, Inc. v. City of Los Angeles**, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) (copy of the Order being

attached hereto as Apx. K), the district court there found that "while the **Renton** standard is still the controlling standard in this case, that standard was ***modified*** by the Supreme Court's holding in **Alameda Books**. Specifically, the court agrees with the plaintiffs that ***the proportionality requirement*** [as set forth in Justice Kennedy's concurring opinion] ***adds a new element to the*** **Renton** ***inquiry***. . . ." Apx. K, at 19 (emphasis and clarification added).

That inquiry includes an examination of whether the regulating body advances "some basis to show that its regulation has the purpose and effect of suppressing secondary effects, ***while leaving the quantity and accessibility of speech substantially intact***." Apx. K at 21 (emphasis added), *quoting* **Alameda Books**, 535 U.S. at 449. *See also* Apx. K at 22-24. In addition, the court notes that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately."[24] Apx. K at 26. Yet, that is ***exactly*** the purpose and effect of the hours of operation restrictions contained in Chapter 111.

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[24] If this Court does, indeed, seek to "borrow" the convoluted federal jurisprudence of intermediate scrutiny related to sexual expression, this Court must also decide, in addition to the narrow tailoring issue, the evidentiary standards that must be applied in order to satisfy the justification for such regulations. In that event, Plaintiffs contend that this Court should adopt the partial concurrence and partial dissent of Justice Souter in **Pap's II** (529 U.S. at 310-17), and his dissent, joined in by Justices Stevens, Ginsburg and Breyer, in **Alameda Books** (535 U.S. at 453-66), for the reasons stated therein. This issue was not, however, resolved by the circuit court.

Also relevant is the following quote from the **Alameda Books** district court:

> "The City argues that the plaintiffs are unable to cast direct doubt on the rationale for the ordinance as a matter of law. ***The Court does not agree. The plaintiffs have the opportunity to present evidence showing that the ordinance will not significantly reduce secondary effects, or that it will do so by substantially diminishing speech.***"

Appx. K, at 30 (emphasis added).

Here, Plaintiffs submitted ***uncontroverted*** evidence that Metro's approach to reducing secondary effects "will do so by substantially diminishing speech." At the very least, there were material issues of fact which precluded the entry of summary judgment on this issue. For these reasons, the circuit court's decision in upholding the hours of operation provision should be reversed.

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL.

Section 111.30 prohibits those establishments which hold adult entertainment business licenses from also obtaining liquor licenses. This provision of the Ordinance, however, is preempted by state statute. "[T]he power of the state to regulate the alcoholic beverage industry is supreme. Any delegation of that authority, because of the nature of the industry, must be specific and unequivocal, not merely inferential." **Whitehead v. Estate of Bravard**., 719 S.W. 2d 720, 724 (Ky. 1986). Thus, any local regulation of that

industry must be specifically authorized by either the General Assembly or the Alcoholic Beverage Control Board. **Id.** In **City of Ashland v. Kentucky Alcoholic Beverage Control Bd.**, 982 S.W. 2d 210, 213 (Ky. Ct. App. 1998), this Court held that absent express or specific authority to disqualify certain retailers from holding an alcoholic beverage license, such a restriction was invalid, and stated:

> "However, there is no express or specific authority to create a scheme that disqualifies certain types of retailers such as grocery stores or gasoline stations from obtaining a package license to sell alcoholic beverages. We agree with the lower court that any conflict between the City's ordinance and a specific statute must be resolved in favor of the statute. *See* **Commonwealth v. Do, Inc., Ky.**, 674 S.W.2d 519 (1984)."

Recently, in **Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't**, 127 S.W.3d 647 (Ky. 2004), the Supreme Court again reaffirmed that where a local ordinance is in conflict with state statues, it may not be enforced:

> "Accordingly, the Metro Government's ordinance is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute cited above. Therefore, in absence of a particular grant of authority to regulate non-licensees by the imposition of civil fines in KRS 241 et seq., **the Metro Government is without authority to apply the penalties set forth in the Ordinance to non-licensees.** *See* **Boyle v. Campbell, Ky.**,

> 450 S.W.2d 265, 268 (1970) (invalidating a city ordinance dealing with Sunday Closing laws, and holding that "if the doctrines of 'preemption' and 'conflict' are not dispositive . . . there is a basic concept which invalidates this ordinance. . . . that the City of Bowling Green simply lacks the authority by local law to amend, modify, interpret or construe at [sic] state statute")."

Id. at 649.

Clearly, there is no state statute that prohibits a business engaged in "adult entertainment" from applying for and receiving a liquor license. And, as stated, a number of the Plaintiffs, in fact, possess just such a license. This provision is therefore statutorily preempted in regard to them.

Moreover, the government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights,[25] as the Sixth Circuit made clear in **G & V**

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[25] It is anticipated that Metro will attempt to rely upon **Louisville v. Woods**, 883 S.W.2d 881 (Ky. Ct. App. 1993), in support of its argument that a municipality may regulate nude or semi-nude dancing at an ABC licensed premise and can therefore prohibit an adult business from obtaining a liquor license. Such an argument would be disingenuous since **Woods** did not address the question of whether Louisville could prohibit a business which presents adult entertainment from obtaining a liquor license. Rather, it merely held that a municipal ordinance which restricted nude or semi-nude dancing was not preempted by the ABC regulation, thereby allowing enforcement of the City ordinance. In finding no preemption, the **Woods** court held that the "ordinance does not conflict with or usurp the state's 'scheme.' It is merely in addition to what the state has attempted to provide as a minimum

Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1077 (6th Cir. 1994). The Ordinance flatly contradicts the well-established precedent that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression. **Id.**[26]

Nevertheless, § 111.44 requires that the liquor-licensed Plaintiffs, as a condition of obtaining their adult business licenses, give up their valuable liquor licenses. Those Plaintiffs have, however, made significant investments in time, money and energy in establishing their businesses, and each of their

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standard, and there is nothing to prevent a local government from establishing minimum standards of conduct permissible in its own territory." **Id**. at 884. In this case, an adult business is prohibited from obtaining an ABC license in the first instance - thus preventing it from complying with local law.

[26] *See also* **Perry v. Sinderman**, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech"); **Keyshian v. Board of Regents**, 385 U.S. 589, 606 (1967); (*quoting* **Sherbert v. Verner**, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"); and **44 Liquormart, Inc. v. Rhode Island**, 517 U.S. 484, 513 (1996) (". . . .it does not follow that conferral of [a governmental] benefit may be conditioned on the surrender of a constitutional right") (clarification added).

licenses are valuable. Metro may not condition the maintenance of the Plaintiffs' liquor licenses upon their willingness to give up their right to engage in constitutionally protected expression. As such, the imposition of such a condition as a requirement to obtain or maintain a liquor license is blatantly unconstitutional and is preempted by state law.

H. THE CIRCUIT COURT ERRED IN UPHOLDING THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS AS THEY ARE INFIRM UNDER THE KENTUCKY CONSTITUTION.

Chapter 111 creates an entertainment "buffer zone" by providing that it is a violation for any employee to appear "semi-nude" (i.e., while *clothed*) unless he or she is located:

> ". . .[A]t least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor. The six (6) foot requirement is measured from the edge of the stage where the semi-nude employee is located to the patron seating or standing area, or, if patrons are allowed to sit at the stage, from the edge of the stage to a line or other barrier six feet from the edge beyond which employees are allowed to appear semi-nude."

§ 111.35(B). The circuit court erred in upholding the constitutionality of such provisions as they violate the Kentucky Constitution for a variety of reasons.

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION.

That the six-foot buffer zone does not pass scrutiny under the Kentucky Constitution is ***directly*** demonstrated by the Oregon Supreme Court's recent consideration of the constitutionality of a similar (but two foot ***smaller***) buffer zone under Art I, Section 8 of the Oregon Constitution[27] in **City of Nyssa v. Dufloth**, 121 P.3d 639 (Or. 2005). There, the ordinance in question required every entertainer to be clothed unless "removed at least four feet from the nearest patron."[28] **Nyssa**, 121 P.3d at 640. In its decision, the Oregon Supreme Court relied on its analysis in the related case of **Ciancanelli**, decided the same day. That decision found that a statute prohibiting "live public shows" in which participants engaged in "sexual conduct" was aimed directly toward the expressive aspect of the conduct that the law described, and therefore was a regulation restraining free expression. **Id.** at 634.

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[27] Article I, Section 8 of the Oregon Constitution is similar to the corollary provisions of the Kentucky Constitution, and provides that: "No law shall be passed restraining the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[28] It is important to note that the buffer zone in Nyssa applied in regard to ***nude*** entertainers. As stated herein on numerous occasions, neither nude nor even "topless" entertainment is permitted under the provisions of Chapter 111.

Applying that construct, the court in **Nyssa** found that a four foot entertainment buffer zone was also specifically directed by its terms at restraining free expression since the ordinance applied only to performances in establishments that regularly featured nude entertainment. **Nyssa,** 121 P.3d at 643-35:

> "... [T]he legislature constitutionally may enact laws designed to prohibit or punish conduct that amounts to prostitution or other criminal activity, but *Article I, section 8*, precludes the Legislature from using limitations on speech or expression as a substitute for regulating that conduct directly. . . . In the present case, the city constitutionally can regulate such conduct as sexually contact between performers and patrons, and the fact that an individual uses speech or expression in the course of that conduct would not immunize the individual from prosecution. However, that is not what the ordinance at issue here does. The four-foot ordinance does not specifically preclude or even refer to sexual contact between performers and patrons. Rather, as discussed, it simply restrains certain kinds of expression in certain kinds of establishments."

Nyssa, 121 P.3d at 644 n.5 (citations omitted). Accordingly, the buffer zone ordinance was found unconstitutional on its face as a restraint upon free expression. **Id.**

The six foot buffer zone here is similarly directed solely at the expressive aspect of live entertainment, and is therefore a direct restraint on expression

protected by the Kentucky Constitution. As noted in **Nyssa**, these types of buffer zones are aimed directly at a particular type of expression as they only apply to "one disfavored type of communication (nude performances) in one disfavored type of establishment (one that regularly features that type of entertainment)." **Id.** at 643 (clarifications in original). Like the **Nyssa** ordinance, Chapter 111 also restrains free expression and should therefore have been declared unconstitutional.

2. THE ENTERTAINMENT BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION.

Section 1 of the Kentucky Constitution protects the freedom of association. The corollary rights protected under the First Amendment are described in **Roberts v. United States Jaycees**, 468 U.S. 609, 618 (1984), where the Court stated that it "has recognized a ***right to associate*** for the purpose of ***engaging in those activities protected by the First Amendment***." (Emphasis added). Here, of course, Plaintiffs are engaged in "First Amendment" speech-related activities. And, the Sixth Circuit has agreed that exotic dance performers and patrons desiring to view such entertainment are indeed imbued with freedom of association protections under the First Amendment. **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396-97 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002).

Most importantly, freedom of association rights are not analyzed under an intermediate level of scrutiny.

Rather, infringements on such liberties must pass muster under strict scrutiny in order to be upheld. "Infringements on that right may be justified by regulations adopted to serve ***compelling*** state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." **Roberts**, 468 U.S. at 623 (emphasis added). *Accord* **Deja Vu of Nashville**, 274 F.3d at 396. Consequently, the freedom of association rights under the Kentucky Constitution must be evaluated pursuant to strict scrutiny as well.

The circuit court improperly rejected Plaintiffs' freedom of association argument in regard to the entertainment buffer zone provisions by in fact relying upon **Deja Vu of Nashville**. R. Vol. VII, pp. 942-62; Apx. A, p. 16. However, what it failed to recognize was that the Sixth Circuit there ***agreed*** that exotic dance entertainers and their patrons (even while nude - - which is certainly not the circumstance here) receive freedom of association rights under the First Amendment, and that a ***three foot*** buffer zone was narrowly tailored because "it went no further than necessary. . . ." **Id.** at 396-97.

> "In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville ***has gone no farther than necessary*** by requiring ***a three-foot distance*** between the erotic dancer and the audience."

Deja Vu of Nashville, 274 F.3d at 396-97 (emphasis added). *See also* **Kentucky Restaurant Concepts**,

209 F.Supp.2d at 680-82 (a ***three foot*** dancer/patron buffer zone contained in the now-superceded Louisville Code of Ordinances went "no further" than necessary and was therefore sufficiently narrowly tailored).[29]

Consequently, given the fact that Metro has enacted a buffer zone ***twice as large*** as the Sixth Circuit and the federal district court here in Louisville have noted to be necessary to effectuate the purported governmental interests, it goes without saying that such a requirement cannot pass muster under the narrow tailoring component of ***either intermediate or strict scrutiny***. In addition, the governmental concerns noted by the Sixth Circuit in **Deja Vu of Nashville** are simply irrelevant here, for those entertainers could dance ***fully nude***. Here, Chapter 111 ***specifically precludes*** such dance entertainment.

3. THE ENTERTAINMENT BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY.

Assuming, *arguendo*, that the constitutionality of the entertainment buffer zone under Ky. Const. § 8 is to be evaluated pursuant to federal intermediate scrutiny (whatever that may be), the first thing for this Court to determine is whether Metro had the power to enact this regulation in the first place. **O'Brien**, 391 U.S. at 377. It did not.

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[29] In addition, both of these cases were decided before the Supreme Court decision in **Alameda Books**, which significantly undercuts any contention that the government can enact such entertainment buffer zones.

The preambles to Chapter 111 do not articulate a specific reason for adoption of these restrictions. Accordingly, it is somewhat difficult to discern the supposed governmental interest underlying their enactment. However, it is safe to conclude that the supposed purpose was to reduce the chance of any illegal activity occurring between dancers and customers; *i.e.*, some type of illegal or impermissible touching between the two. However, there is nothing inherently illegal about an entertainer, while wearing pasties and a G-string, from dancing five feet eleven inches away from a customer, or performing on a stage that is only seventeen (as opposed to eighteen) inches "from the floor." § 111.35(B).

Consequently, the ability of Metro to enact this "buffer zone" is governed by the dictates of the Supreme Court in **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002), where the Court concluded that the government may not prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" Metro simply does not then have the authority to preclude a form of close but ***clothed*** dancing which does not consist of some form of illegal contact. The remedies available to government are to punish violations of the law; not to abridge the rights of free speech. **Free Speech Coalition**, 535 U.S. at 245. See also **Commonwealth v. Ashcraft**, 691 S.W.2d 229, 232 (Ky. Ct. App. 1985) (regulation is overbroad when "in an effort to control impermissible conduct, the [ordinance] also prohibits conduct which is constitutionally permissible" (clarification added)). Metro may prohibit impermissible sexual touching, but it may not criminalize ***clothed*** dancing in close

proximity to viewers. While the former may be narrowly tailored, the latter is not.

But the foremost reason that this "buffer zone" is not narrowly tailored is because of its impact upon protected expression. In Subsection I(F), Plaintiffs discussed the fact that imposing a significant impact upon the exercise of expressive activities results in a constitutional deprivation. Part of that argument revolves around Justice Kennedy's critical concurrence in **Alameda Books**. There, he provides an example of when his "proportionality" standard has been violated. If a law has a minimal ***two percent impact upon speech and expression-related activities***, it will not be found to be constitutionally wanting. 535 U.S. at 451-53 (Kennedy, J., concurring). Elsewhere, he describes the constitutionally allowable impact as being limited to that which is "trivial." **Id.** at 445.

The law in the Sixth Circuit in regard to this issue *pre*-**Alameda Books** is found in **DLS, Inc. v. City of Chattanooga**, 107 F.3d 403 (6th Cir. 1997), where the appellate court concluded that the effect of a dancer buffer zone must be examined in order to determine whether it "intended to destroy the market for adult cabarets . . . ." **Id.** at 413. However, the court there noted that the plaintiffs had failed to present any type of evidence substantiating any harm being associated with the buffer zone at issue there. **Id.** at 413. Here, however, Plaintiffs presented detailed evidence substantiating just such drastic consequences.

The Affidavit of Brian Franson, Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I) attaches as Exhibit 2 thereto a diagram of the *PT's* club, and demonstrates the effect that the buffer zone would have on that

establishment. The areas in green are where entertainers perform, and the red hatching are all of the areas of the club where -- if entertainers were performing in the green areas -- customers could ***not*** be located pursuant to the requirements of the six foot buffer zone. Franson Aff., ¶'s 7-10; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I.

A simple review by this Court of Ex. 2 to Mr. Franson's affidavit well-illustrates that the dissemination of this form of ***clothed*** expression will be ***significantly*** reduced -- if not completely obliterated - - if the provisions of § 111.35(B) can be enforced. Either, there is little-to-no space left in the club for customers to locate when entertainers are utilizing the stage areas, or if customers are using all of the floor space currently available to them, there is ***no*** space left ***anywhere*** in the club for entertainers to perform. *Accord* Franson Aff., ¶'s 12 and 13, Ex. E, to Supp. Brief, Aug. 4, 2004; Apx. I.

A federal district court has addressed these types of concerns in regard to a ten foot buffer zone in the case of **J.L. Spoons, Inc. v. City of Brunswick**, 49 F.Supp.2d 1032 (N.D. Ohio 1999), and found this type of evidence sufficient to justify the entry of a preliminary injunction to preclude enforcement of such

a buffer zone. Id. at 1046.[30] The same result was warranted here.

I. THE RESTRICTIONS CONTAINED IN CHAPTER 111 ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD.

For the reasons set forth above, the challenged provisions of Chapter 111 are subject to strict scrutiny. Either, they are subject to that level of review in-and-of-themselves, or because they do not satisfy the O'Brien standards, they must be subject to strict constitutional scrutiny. The restrictions as contained in Chapter 111, however, do not pass muster under that heightened standard because they are certainly not the "least restrictive means" available which would be necessary in order to further a compelling governmental interest. Even if "adverse secondary effects" could be used as a basis to justify such regulations, there are certainly a myriad of less restrictive means available which would not so adversely impact upon the engagement of speech and expression-related activities. Zoning laws and

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[30] The district court in J.L. Spoons also observed that the two foot stage height requirement rendered the buffer zone duplicative and therefore most likely unconstitutional. J.L. Spoons, at 49 F.Supp.2d at 1045-46 (". . . if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease"). Given the fact that § 111.36(B) contains a similar (albeit eighteen inch) stage height requirement, the buffer zone fails the narrow tailoring component of O'Brien for this additional reason.

prohibitions against sexual conduct and contact are only a few such examples. Because Chapter 111, however, has such a drastic impact upon protected expression, it does not satisfy the requisites of strict scrutiny which the Kentucky Constitution requires.

II. THE CIRCUIT COURT ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES.

Plaintiffs challenged a number of terms contained in Chapter 111, including the critical definitions therein, as being impermissibly vague. Brief, March 5, 2004; Apx. R, pp. 41-46. Yet, the circuit court concluded that Plaintiffs lacked standing to challenge the definitions under § 111.02 as to what would constitute an "adult entertainment establishment because Plaintiffs ***admittedly*** qualify as such establishments." R. Vol. VII, pp. 942-62; Apx. A, p. 13. Respectfully, Plaintiffs never "admitted" any such thing.

In fact, Plaintiffs' complaint asserts only that "***Defendant contends*** that Plaintiffs are subject to the regulatory provisions of the Ordinance. . . ." Complaint, ¶ 17; R. Vol. I, pp. 1-44. *See also* Complaint, ¶ 24 (same allegation). Paragraph 21 of the complaint further asserts that two entertainers, despite wearing clothing covering more than required in the Ordinance, received citations for violating Chapter 111 and "are now subject to criminal penalties." The paragraph also states that this action "was taken despite Metro's representations to Division 6 [the circuit court] that the regulatory provisions would ***not*** apply to entertainers dressed in such a

fashion." (Emphasis and clarification added). Accordingly, Plaintiffs have not "admitted" that they "qualify" as such establishments, and because the definitions of the Ordinance are so central to the enforceability of its provisions, the circuit court's ruling should not stand until these issues are addressed and resolved. The circuit court also concluded that Plaintiffs lacked standing to challenge the prohibition of minors as set forth in § 111.17 (Plaintiffs having raised this argument in Apx. S, pp. 18-24), stating that the rights of minors "are not before this Court. . . ." R. Vol. VII, pp. 942-62; Apx. A, p. 9. This conclusion is erroneous for two reasons. First, the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see, e.g.*, § 111.99 and § 111.43), applies to the "***operator***," and ***not*** the minor. *See* § 111.17(a) ("an ***operator or employee*** of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment") (emphasis added). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting ***their own rights*** to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them***. Second, Plaintiffs are clearly entitled to assert standing of their patrons.[31]

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[31] *See, e.g.*, **Connection Distributing Co. v. Reno**, 154 F.3d 281, 289 n.6 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999) (adult entertainment magazine had standing to assert First Amendment rights of its advertisers and readers). *See also* **Hang On, Inc. v. City of Arlington**, 65 F.3d 1248, 1252 (5th Cir. 1995) (adult cabaret has standing to assert the rights of entertainers who perform there); **Craig v. Boren**, 429 U.S. 190, 192-97 (1976) (seller of beer had standing to argue that a state statute violated

Because of these erroneous standing rulings, the circuit court never addressed the ***merits*** of these claims and, consequently, its decision should therefore be reversed.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS.

Plaintiffs raised the following arguments in their various briefings which the circuit court simply failed to address in its ruling; each of which was sufficient in-and-of itself to warrant the denial of summary judgment in favor of the Defendant. These include:

- The inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions. Plaintiffs raised this issue in their Brief filed March 5, 2004; Apx. R, pp. 48-52.[32] The circuit court failed to

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its customers' equal protection rights); and Carey v. Population Serv. Int'l, 431 U.S. 678, 682-84 (1977) (mail-order retail business engaged in the sale of non-medical contraceptives had standing to assert that a state law prohibiting the distribution of such materials by anyone other than a licensed pharmacist violated its customers' substantive due process rights to use such devices).

[32] Because the circuit court never even addressed these various matters, Plaintiffs will not substantively discuss them in detail here, but rather refer this Court to the sections of the various memoranda in the record where they were extensively commented upon for the detailed arguments as to why these provisions are unconstitutional. Nevertheless, Plaintiffs will in footnote form,

rule on this issue, even though it noted in its Dec. 14 Order this argument. R. Vol. VII, pp. 942-62; Apx. A, pp. 7-8.

- The no direct "tipping" provision of § 111.35(C) violated the right of liberty and the right of freedom of speech. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 64-69.[33] While the circuit court concluded that this ordinance provision was not vague (R. Vol. VII, pp. 942-62; Apx. A, pp. 16-17), ***Plaintiffs had made no such vagueness challenge***.

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provide very brief references to the applicable authorities which support the unconstitutionality of these provisions. On the specific issue regarding the doctrine of unconstitutional conditions, *see*, *e.g.*, **G&V Lounge, Inc. v. Michigan Liquor Control Commission**, 23 F.3d 1071, 1077 (6th Cir. 1994) (government cannot condition the receipt of a benefit, such as a license, upon the agreement to refrain from exercising one's constitutional rights – here the rights under Ky. Const. § 10 against warrantless searches); and **44 Liquor Mart, Inc. v. Rhode Island**, 517 U.S. 484, 513 (1996) (same).

[33] In regard to the violation of the entertainers' liberty interest, the most relevant authorities include **Lawrence v. Texas**, 539 U.S. 558, 564 (2003) (court referring to the "broad statements" of the substantive reach of liberty under the Due Process Clause, and that liberty "presumes an autonomy of self that includes freedom of thought, belief, [and] expression. . . "); and **Allgeyer v. State of La.**, 165 U.S. 578, 589 (1897) (liberty includes the right "to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation. . .") (clarifications added).

- The entertainment "buffer zone" as set forth in § 111.35(B) violated the right of liberty. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 73-75.[34]

- The licensing scheme of Chapter 111 is unconstitutional because it does not maintain the status quo pending judicial determination. Brief, March 5, 2004; Apx. R, pp. 32-34.[35]

- The licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof once in court. Brief, March 5, 2004; Apx. R, pp. 34-38.[36]

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[34] *See* n. 33, *supra*. In addition, the Court in **Lawrence** noted that "[f]reedom extends beyond spacial bounds." 539 U.S. at 562.

[35] *See* **Nightclubs**, 202 F.3d at 894; **Deja Vu of Nashville**, 274 F.3d at 400 (the status quo must be preserved pending a final judicial determination on the merits); **T.K.'s Video, Inc. v. Denton County**, 24 F.3d 705, 708 (5th Cir. 1994) (the government cannot regulate an existing business during the licensing process); and **Freedman v. Maryland**, 380 U.S. 51 (1965) (for a law which effectuates a prior restraint on expression to pass muster under the First Amendment, it must, among other things, provide that any restraint prior to judicial review can be imposed only for a specified brief period of time during which the status quo must be maintained).

[36] *See* **Freedman** 380 U.S. at 58-60 (the government must bear the burden of going to court to suppress speech and must bear the burden of proof once in court); and **Cathy's Tap, Inc. v. Village of Mapleton**, 65 F.Supp.2d 874, 889-90 (C.D. Ill. 1999) (licensing scheme of adult businesses must contain the **Freedman** requirement that the government initiate judicial review and bear the burden of proof once in court).

- Metro cannot engraft a dancer buffer zone and "no tip" provision, because Chapter 111 already prohibits both full nudity and "topless" entertainment, which has been recognized by the courts as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 24-29.[37]

Because the circuit court did not adjudicate any of these critical constitutional issues, because Plaintiffs' arguments on these matters are well taken, and

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[37] *See* **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d. 631, 637-38 (7th Cir. 2003) (ordinances prohibiting nude and "topless" dancing in an establishment licensed to sell alcoholic beverages, prohibiting nude and topless dancers from having any physical contact with any other person during a performance, and imposing a dancer/patron buffer zone, were constitutional because they did not prohibit nude dancing (unlike Chapter 111), and the entertainment was not effected because "if all dancers choose to wear *de minimis* clothing necessary to cover all 'specified anatomical parts' then neither the physical proximity nor alcohol prohibition requirement are implicated"); **Kentucky Restaurant Concepts**, 209 F.Supp.2d at 682 (basically the same); and **R.V.S., L.L.C. v. City of Rockford**, 361 F.3d 402, 413-16 (7th Cir. 2004) (city's attempt to regulate entertainment establishments which provided ***clothed*** entertainment (such as Chapter 111 now does) was unconstitutional because, in utilizing Justice Kennedy's approach in **Alameda Books**, as a "direct restriction on erotic expression speech fares worse under the Ordinance than it did under the laws at issue in similar cases," with the court further noting that the ordinance did not apply to nude dancing or other forms of nude entertainment, and that the "uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals"). Here, however, this Ordinance precludes nude entertainment but still then regulates clothed expression.

because each and every one of these claims was sufficient to defeat the entry of summary judgment on behalf of the Defendant, the decision below should be reversed, with instructions for the circuit court to consider and resolve these various claims.

IV. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE.

One of the challenges brought by Plaintiffs was that Chapter 111 was "not enacted upon a proper basis, nor supported by competent and material evidence. . . ." Complaint, Ex. D, ¶ 27(u); R. Vol. I, pp. 1-44. As the Supreme Court noted in **Renton**, the enactment of at least *zoning* ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments (*i.e.*, the causing of neighborhood crime, decreases in property values, and the increasing of urban blight). 475 U.S. at 47. Chapter 111 was certainly enacted upon such purported concerns. *See* Apx. B, § 111.01. Yet, assuming, *arguendo*, that irrespective of the matters discussed in Subsections I(B) and (E) above (that this doctrine cannot be utilized under the Kentucky Constitution to potentially justify the enactment of restrictions like those that are found in Chapter 111), this Court nevertheless decides that "Federal" intermediate scrutiny is the appropriate standard to apply, Plaintiffs certainly have the right to ***challenge***

Metro's assertion that its Ordinance is justified upon a concern of adverse secondary effects.

First, the Court observed in **Pap's II**, where it extended – in a plurality fashion – application of the secondary effects doctrine to anti-nudity laws:

> "Here, Kandyland [the plaintiff there] has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, ***Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings***."

Pap's II, 529 U.S. at 298 (emphasis and clarification added).

Second, in **Alameda Books**, the plurality opinion authored by Justice O'Connor noted that in attempting to justify restrictions on expression, a municipality can't "get away with shoddy data or reasoning," and that its "evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Further, the Court held that:

> "If plaintiffs ***fail to cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in **Renton**. If plaintiffs ***succeed in casting doubt on a municipality's rationale in either manner***, the burden shifts back to

> the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Id. at 438-39 (clarification and emphasis added).

While these Plaintiffs raised such a challenge as to the evidentiary justification for the enactment of Chapter 111 and the amendments thereto in their complaint, this matter was ***not*** at issue in the three pending motions. Indeed, Plaintiffs pointed that out to the circuit court. *See* Plaintiffs' Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, at pp. 1-2. Nevertheless, the court granted complete summary judgment to the Defendant and never permitted Plaintiffs to factually litigate their secondary effects challenge. ***More importantly, the circuit court actually "cleansed" the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***

When Metro filed its Composite Reply in Support of its Motions for Summary Judgment and to Dissolve, and in Opposition to the Plaintiffs' Motion for Temporary Injunction, it raised specific arguments in regard to its evidentiary "justification" for enacting Chapter 111, and submitted certain affidavits in support thereof. Because Metro was then raising new arguments for the first time in its reply, Plaintiffs filed a motion to strike the composite reply. R. Vol. VII, pp. 899-910; Apx. L. Pursuant to that motion, the circuit court initially granted the alternative relief requested, which was the ability of Plaintiffs to complete certain depositions (which were scheduled for

October 18-21, 2004[38]), and to then file a sur-reply brief with necessary counter-affidavits. R. Vol. VI, pp. 897-98; Apx. M.

Defendant then filed a motion for clarification of that order. R. Vol. VII, pp. 918-24. The circuit court then entered an additional Order – ***issued by agreement of the parties*** – stating that the composite reply was to be stricken, and further ordering that Metro was to file a "new Reply ***which eliminates reference to the affidavits filed in the stricken reply***. . . ." R. Vol. VII, pp. 933-34; Apx. N (emphasis added). The court also ordered, again pursuant to the agreement of the parties, that ***Plaintiffs*** would strike "Exhibit C" of their exhibit packet in support of their Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order. **Id.**

"Exhibit C," which was stricken, was the affidavit of Plaintiffs' secondary effects expert, Dr. Daniel Linz, with supporting evidentiary materials.[39] Apx.Q.

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[38] The various deposition notices and accompanying expert witness interrogatories are found as Apx. P. No discovery was, however, taken before the circuit court entered summary disposition.

[39] In addition, during the pendency of these motions, this Court issued its decision in **Jameson v. Commonwealth**, No. 2003-CA-000967-DG, 2004-WL-1752597 (Ky. Ct. App. Aug. 6, 2004), *motion for discretionary review granted*, which dealt with such an evidentiary challenge. This led to Plaintiffs filing a second supplemental brief for the purpose of demonstrating that full summary judgment could not be justified (even if the court disagreed with every contention raised by the Plaintiffs in the

Subsequently, Judge Ryan entered an amended order (R. Vol VII, pp. 937-38; Apx. O) which clarified what was being stricken, and required Metro to file a "new Reply which ***eliminates reference to the secondary effects affidavits filed in the stricken Reply***. . . ." (New language underlined).

Accordingly, the court sanitized the record to insure that the evidentiary challenge to the secondary effects basis of Chapter 111 would not be at issue in the pending motions, yet it then nevertheless granted virtually complete summary judgment to the Defendant without ever affording the Plaintiffs the opportunity to litigate that claim.

If Plaintiffs were to have successfully challenged the secondary effects justification for the enactment of Chapter 111 at trial under **Pap's II** and **Alameda Books**, the entire ordinance would be ***invalid***.[40] Given

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pending motions), because Plaintiffs could submit at trial virtually the same type of evidence which this Court in **Jameson** found to have rebutted the supposed "secondary effects" basis for enacting the ordinance there. Attached thereto was trial testimony from a federal district court action in Louisville involving some of these same Plaintiffs, and exhibits that were previously entered in that action establishing a lack of connection between a number of the "cabarets" in town and adverse secondary effects. Testimony was also attached which concerned the lack of disease transmission in these type of establishments. R. Vol. IV, pp. 588-98; Apx. T.

[40] *See, e.g.*, **Alameda Books**, 535 U.S. at 439 (if Plaintiffs "succeed in casting doubt on a municipality's rationale," the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance); and at 452 (if the assumptions that these types of

the record originally submitted by the Plaintiffs below, and more importantly the lower court's subsequent cleansing thereof, it was improper to dismiss Plaintiffs' entire lawsuit without affording them the opportunity to litigate their claim that Metro did not have a sufficient evidentiary basis to enact Chapter 111.

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER.

For the same reasons that a reversal of Defendant's partial grant of summary judgment is warranted, the circuit court's denial of Plaintiffs' motion for temporary injunction also warrants reversal as such an injunction was necessary to prevent any further irreparable harm to Plaintiffs' freedom of expression rights. Plaintiffs established the elements required for the issuance of a temporary injunction pursuant to CR 65.04: (1) whether the Plaintiff has shown a probability of irreparable injury; (2) whether the public interest will be harmed, or whether the injunction will merely be to maintain the status quo; and, (3) whether a substantial question has been presented. **Maupin v. Stansbury**, 575 S.W.2d 695, 699 (Ky. App. 1978).

Plaintiffs clearly showed a probability of irreparable injury as they were being, and would continue to be, deprived of their right to free expression under the Kentucky Constitution if an

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"adult" establishments engender secondary effects "can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny") (Kennedy, J., concurring).

injunction was not issued. Any infringement of expressive rights, for even minimal periods of time, constitutes irreparable harm under the federal constitution, **Elrod v. Burns**, 427 U.S. 347, 353 (1976), and nothing is different under the State Constitution. **James**, 63 S.W.3d at 605 ("Restraining free speech constitutes immediate and irreparable harm, if unauthorized"). Moreover, the public interest would not have been harmed by an injunction as "it is always in the public interest to prevent the violation of a party's constitutional rights." **G&V Lounge, Inc.**, 23 F.3d at 1079, *citing* **Gannett Co., Inc. v. DePasquale**, 443 U.S. 368, 383 (1979). In addition, the injunction would merely have preserved the status quo. Finally, Plaintiffs presented substantial questions on the merits of their constitutional challenges.

CONCLUSION

Plaintiffs respectfully request this Honorable Court to reverse that portion of the decision of the circuit court entered on March 5, 2004, which partially granted Defendant's motion for summary judgment and partially denied the Plaintiffs' motion for temporary injunction. This Court should hold Chapter 111 to be infirm under the Kentucky Constitution, or remand for full consideration of Plaintiffs' claims.

Dated: March 3, 2006

/s/ Frank Mascagni III
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Bradley J. Shafer**, Co-Counsel for those Parties

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**Pending admissions *Pro Hac Vice*

Paul S. Gold, Attorney for Blue Movies, Inc., Pure Pleasure Mega Center, LLC, Taylor Boulevard Theatres, Inc., and Win Place and Show Bar, Inc.

H. Louis Sirkin***, Attorney for Blue Movies, Inc., Blue Sky Video, Inc., Cam I, Inc., Pure Pleasure Mega Center, LLC, Taylor Boulevard Theatres, Inc., TBC, Inc., and Win Place and Show Bar, Inc.

***Admitted *Pro Hac Vice*

C. Michael Hatzell, Attorney for Blue Sky Video, Inc., Cam I, Inc., Danny's Inc., Entertainment Enterprises, Inc., Gold Coast, Inc., Hayes Entertainment, Inc., LLL, Inc., Phat's Bar & Grill, Inc., Riverview Entertainment, Inc., South Dixie Entertainment, Inc., TBC, Inc., Teddy's Inc., Thorobred, Inc., and Tinsley's Central Bar, Inc.

Ronald L. Cook and David S. Stevenson, Attorneys for Foxy Lady, Inc.

E. Brian Davis, Attorney For American Pride VI, Inc.

APPENDIX I

COMMONWEALTH OF KENTUCKY
SUPREME COURT

[Filed November 2, 2007]

CAM I, INC. D/B/A PRESTON VIDEO, ET AL.	)
MOVANTS	)
vs.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
RESPONDENT	)

MOTION FOR DISCRETIONARY REVIEW

On Appeal From The Judgment Of The
Commonwealth of Kentucky Court of Appeals
Case No. 2005-CA-000085-MR;
Case No. 2005-CA-000090-MR;
Case No. 2005-CA-000091-MR;
Case No. 2005-CA-000092-MR;
Case No. 2005-CA-000100-MR;
Case No. 2005-CA-000113-MR;
Case No. 2005-CA-000176-MR;

Comes the Movants, by counsel, and pursuant to CR 76.20, hereby submit their Motion for Discretionary Review:

DESIGNATIONS AND STATEMENTS

(a) The Movants are as follows:

Cam I, Inc., d/b/a *Preston Video*;
Blue Movies, Inc. d/b/a *Love Boutique*;
Blue Sky Video, Inc.;
Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*;
American Pride VI, Inc., d/b/a *Lion's Den Adult Superstore*;
Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*;
TBC, Inc., d/b/a *Metro Station*;
Danny's Inc., d/b/a *Thorobred II*;
Entertainment Enterprises, Inc., d/b/a *The Godfather*;
Gold Coast, Inc., d/b/a *Thorobred III*;
Hayes Entertainment, Inc., d/b/a *Thorobred IV*;
LLL, Inc., d/b/a *Greenlight Lounge*;
Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*;
Riverview Entertainment, Inc., d/b/a *Thorobred VI*;
South Dixie Entertainment, Inc., d/b/a *Thorobred VII*;
Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub*;
Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*;
Teddy's Inc., d/b/a *Thorobred V*;
Thorobred, Inc., d/b/a *Thorobred Lounge*;
Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*;
Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and

Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*.

All Movants are jointly represented by C. Michael Hatzell of the law firm of Hatzell & Groves, 704 One Riverfront Plaza, Louisville, Kentucky, 40202.

Of counsel for the Movants are H. Louis Sirkin, Jennifer M. Kinsley, and Scott Ryan Nazzarine of the Law Firm of Sirkin, Pinales & Schwartz LLP, 105 West Fourth Street, Suite 920, Cincinnati, Ohio 45202; Frank Mascagni, III, and Paul S. Gold, 701 West Jefferson Street, Louisville, Kentucky 40202; and Bradley J. Shafer of Shafer & Associates, P.C., 3800 Capital City Blvd., Suite 2, Lansing , Michigan 48906.

The Respondent in this case is the Louisville/ Jefferson County Metro Government. Respondent is represented by N. Scott Lilly, William P. O'Brien, and Winston King, Assistant County Attorneys, 531 Court Place, Suite 1001, Louisville, Kentucky 40202 and by Scott D. Bergthold, Law Office of Scott D. Bergthold, PLLC, 8052 Standifer Gap Road, Suite C, Chattanooga, Tennessee, 37421.

(b) The final disposition of the Court of Appeals, a copy of which is being filed with the instant Motion, was an Opinion Affirming in Part and Reversing in Part, which was rendered October 5, 2007.

(c) No supersedeas bond or bail on appeal has been executed.

(e) The Movants state that they do not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(f) Movants are not aware of any other party to the proceedings having any petition for rehearing or motions for reconsideration pending in the Court of Appeals.

MATERIAL FACTS

Movants are various businesses located in and around the Louisville/Jefferson County area which are either: (a) retail facilities that present, sell and rent to the consenting adult public a variety of presumptively protected non-obscene but sexually explicit expressive materials and/or (b) liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license), which present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude.

Respondent Louisville/Jefferson County Metropolitan Government ("Metro") is the governmental and law-making body that was formed in January 2003 when the City of Louisville, Kentucky and Jefferson County, Kentucky merged into one governmental entity.

On March 1, 2004, Metro enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance;" a copy of which is found as Apx. B). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that

all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); it requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and it provides for penalties for violating the Ordinance–in addition to license suspension and/or revocation–which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 nor more than $500.00, or

imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

On March 5, 2004, Movant Kentucky Restaurant Concepts, d/b/a PT's ("PT's"), and another party, Blue Movies, Inc., d/b/a Love Boutique ("Blue Movies"), filed suit in Jefferson Circuit Court challenging the Ordinance on numerous state constitutional grounds.[1] At the same time as they filed suit, PT's and Blue Movies filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction.

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. The Movants' Motion for Temporary Injunction was left pending.

Thereafter, Metro removed the case to federal court and Movants then filed a motion to remand. Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction while the case was in federal court. The federal court then granted Movants'

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[1] In June and July of 2004, the various other establishments were granted permission to intervene as plaintiffs in the trial court. However, in order to avoid further complications and confusions, all parties who were Plaintiffs or Intervenors in the circuit court and Appellants/Cross-Appellees in the court of appeals will simply be referred to as "Movants" in this document. Similarly, Metro may be referred to as Respondent in this document even when discussing its role as Defendant in the trial court or as Appellee/Cross-Appellant in the Court of Appeals.

motion to remand because the court concluded that it lacked jurisdiction in that all claims raised by the Movants were based on Kentucky constitutional grounds and there were no federal questions presented.

Following the remand, the circuit court "passed to the trial date" the Respondent's motion to dissolve Temporary [sic] Restraining Order/Temporary Injunction. Metro then filed a motion for summary judgment and a supplemental brief in support of its motion to dissolve the temporary restraining order. Movants also filed a supplemental brief in support of their motion for temporary injunction. Pending before the circuit court were therefore: 1) the Movants' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/ Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the restraining order; granting Metro's motion for summary judgment as to all issues except for § 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Movants' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. The circuit court granted virtually complete summary judgment to Respondent Metro: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-

pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

The circuit court denied a motion for stay pending appeal, but stayed enforcement of Chapter 111 long enough for the Movants to seek a stay from the Kentucky Court of Appeals. It further ordered the filing of a $25,000.00 bond from each Movant for that short stay period. Movants all timely filed Notices of Appeal in the Court of Appeals, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). Upon application, the Court of Appeals issued a stay pending appeal and reduced the bond amount to $500.00 per Movant.

After thorough and extensive briefing on all the issues raised, the Court of Appeals on October 5, 2007 issued an Opinion Affirming in Part and Reversing in Part. Applying a *de novo* standard of review of the circuit court's summary judgment rulings, the Court of Appeals essentially ruled in favor of Metro on every possible issue. The Court of Appeals rejected all of Movants' assignments of error and affirmed the Circuit Court's judgment on all issues raised by Movants. The Court of Appeals reversed the Circuit Court on both issues raised by the Respondents in their cross-appeal, finding both the disclosure of shareholders provision (Section 111.36(B)(2)(b)) and the "no-touching" provision (Section 111.35(D)) of the Ordinance to be constitutionally sound.

The Movants now submit this Motion for Discretionary Review to petition this Court to review

and ultimately reverse the Court of Appeals's Opinion on all grounds.

QUESTIONS OF LAW

(1) Whether the Court of Appeals erred in rejecting Movants' argument that, at least in some contexts, the Kentucky Constitution does provide greater protection of individual liberties than its federal counterpart.

(2) Whether the Court of Appeals erred in rejecting out-of-hand Movants' contention that Kentucky courts should look to or at least consider decisions from other jurisdictions (especially to the courts of Pennsylvania, because Kentucky's Constitution relies heavily on Pennsylvania's Constitution and its language) in interpreting and construing the Kentucky Constitution and, in particular, its protections of the principles of free speech.

(3) Whether the Court of Appeals erred in giving too much weight to obviously outdated cases (for example, *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129, from 1915) for comparison's sake in analyzing the constitutionality *vel non* of the expressive conduct at Movants' businesses.

(4) Whether the Court of Appeals erred in finding that the Ordinance furthers a substantial governmental interest.

(5) Whether the Court of Appeals erred in finding that Chapter 111 is content neutral and unrelated to the suppression of free expression.

(6) Whether the Court of Appeals erred in holding that the Ordinance's various restrictions on speech are no greater than essential. More specifically whether the Court of Appeals erred in holding that:

(a) the impact Chapter 111's prohibition on nudity (Section 111.35(A)) has on free expression is *de minimis*;

(b) the restrictions on operating hours provision (Section 111.18) is constitutional in that it leaves open "ample channels of communication";

(c) the prohibition on alcohol sales at adult businesses (Section 111.30) is not constitutionally infirm; and

(d) the staging requirements mandating that employees who appear "semi-nude" must be on a stage at least eighteen inches from the floor and six feet from any patron are not greater than necessary.

(7) Whether the Court of Appeals erred in holding that the staging requirements mandating that employees who appear "semi-nude" must be on a stage at least six feet from any patron do not infringe upon Movants' reasonable ability to operate.

(8) Whether the Court of Appeals erred in holding that the staging requirements mandating that employees who appear "semi-nude" must be on a stage six feet from any patron and at least eighteen inches from the floor do not violate the freedom of association, especially considering that the Court never addressed the issue of whether this regulations served a

compelling state interest or could be achieved through means significantly less restrictive.

(9) Whether the Court of Appeals erred in separately analyzing each provision of Chapter 111 as individual isolated restriction rather than considering the effects of the Ordinance in the aggregate and the assertion that their combined effect was intended to destroy the market for adult businesses in the area.

(10) Whether the licensing fees contained in Chapter 111 constitute a prior restraint on speech in that the fees are not reasonably correlated with the cost of administering and enforcing the ordinance but are instead a "charge" upon the exercise of First Amendment rights.

(11) Whether the prohibition on direct tipping (Section 111.35(C)) constitutes an undue and unconstitutional economic burden on free speech rights and whether this burden effects content discrimination on Movant's adult businesses.

(12) Whether the Court of Appeals erred in affirming the Circuit Court's decision that Movant's had no standing to challenge Chapter 111 under the vagueness doctrine of the First Amendment.

(13) Whether the Court of Appeals erred in finding that Movant's had no standing to challenge Chapter 111's restrictions on admitting minors.

(14) Whether the Court of Appeals erred in affirming the Circuit Court's decision that Movant's had no standing to challenge Chapter 111's criminal disability provisions.

(15) Whether the Court of Appeals erred in finding (either explicitly or by not addressing the assignment of error) that the Circuit Court adequately and sufficiently addressed all of the issues and arguments properly raised by the Movants at the Circuit Court, including specifically:

(a) that Chapter 111's prohibition on direct tipping and its buffer zone regulations violated Movant's constitutional right to liberty;

(b) that the licensing scheme of Chapter 111 did not maintain the status quo pending a judicial determination;

(c) that Chapter 111 did not contain the requisite procedural guarantees or provide prompt and adequate judicial review for a restraint on expression;

(d) that Metro could not implement a buffer zone and prescribe direct tipping if Chapter 111's prohibition on full nudity and topless dancing are upheld; and

(e) that the inspection provisions (Section 111.39) violated the doctrine of unconstitutional conditions.

(16) Whether the Court of Appeals erred in concluding that Movants' were afforded a sufficient opportunity to litigate the secondary effects issue at the Circuit Court level.

(17) Whether the Court of Appeals erred in holding that Movants did not set forth sufficient evidence to cast direct doubt on Metro's rationale for

the Ordinance and that Respondents submitted evidence to rebut Movant's evidence.

(18) Whether the infirmity of the licensing scheme contained in Chapter 111 invalidates the entire ordinance.

(19) Whether the Court of Appeals erred in reversing the Circuit Court's judgment by finding that the disclosure of principal shareholders provisions (Sections 111.36(B)(2)(b) and 111.02) is not greater than essential to further the alleged governmental interest and is not overly broad.

(20) Whether the Court of Appeals erred in reversing the Circuit Court's judgment by finding that the "no touch" provisions of Chapter 111 (Section 111.35(D)) is susceptible to a reasonable narrowing construction and that it does not apply to expressive conduct.

REASONS WHY THE JUDGMENT BELOW SHOULD BE REVIEWED

In *Commonwealth v. Wasson*, the Kentucky Supreme Court succinctly stated:

> Contrary to popular belief, the Bill of Rights in **the United States Constitution represents neither the primary source nor the maximum guaranteed of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution.** The adoption of the Federal Constitution in 1791 was

> preceded by state constitutions developed over the preceding 15 years, and, **while there is, of course, overlap between the state and federal constitutional guarantees of individual rights, they are by no means identical**.
>
> ....
>
> **Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties significantly greater than the selective list of rights addressed by the Federal Bill of Rights**.

842 S.W.2d 487, 492, 494 (1992) (emphasis added).

Furthermore, the Supreme Court in *Wasson* noted that "[a] comparison of the Kentucky Bill of Rights ... demonstrates **unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution** of 1790," and that "because of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790 [] **[d]ecisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own**." *Id.* at 492, 498 (emphasis added).

Yet, despite these unequivocal and relatively recent statements of the Commonwealth's Supreme Court that protections of civil liberties under the Kentucky Constitution often far exceed their federal counterparts, and that, furthermore, the meanings and applications of the rights guaranteed by the Kentucky

Constitution may be interpreted in light of Pennsylvania's jurisprudence on similar issues, the Court of Appeals in the instant case flatly refused to consider *any* of Movants' persuasive authority from other states (including, significantly, that of Pennsylvania) which shed light on what protections should be afforded to the guarantees of free expression in regard to adult businesses under the Commonwealth's Constitution. Moreover, in order to reject Movants' claims that the Kentucky Constitution provides more protections of free speech rights than does the Federal Constitution, the Court of Appeals referenced Kentucky cases from the early 1900s that prohibited speech "much milder when compared to the 'expressive conduct' offered at [Movants'] businesses,[2] and flatly stated that, if it were not mandated by the baseline protections in the federal First Amendment, the Court would not give any protection at all to Movants' expression. (*See, e.g.*, Opinion at pp. 87-88, 24 n.8).

As such, it is submitted that this Court should review the Court of Appeals's opinion below in order to resolve these issues and to set the record straight on this apparent conflict. It is respectfully submitted, as outlined above, that there is a glaring contradiction between the Supreme Court's unambiguous words in a previous opinion (*Wasson*) and the Court of Appeals's application of these same constitutional principles to the case *sub judice*. Further, it is respectfully

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[2] It is respectfully submitted that this "much milder" speech that apparently justifies the Court of Appeals's rejection of Movants' argument simply would not and could not be criminalized today consistent with *either* the Kentucky *or* Federal constitutions.

submitted that if an opinion of the Supreme Court appears to have direct application to a case in the lower courts, as Movants submit occurred here with the *Wasson* case, the Court of Appeals should follow the opinion of the higher court, thus leaving to the Supreme Court the prerogative of overruling its own decisions if and when it should decide to do so. In short, it is respectfully submitted that this Court should accept review of this case in order to determine if the Court of Appeals improperly disregarded or gave insufficient weight to an earlier (but recent) opinion of the Supreme Court of Kentucky.

Relatedly, it is submitted that this Court should accept the instant petition for discretionary review in order to bring clarity to what appears to be thorough confusion among the courts regarding this issue of profound importance. There are important constitutional issues of free speech, association, and the right to liberty involved in this case which not only affect the parties to the instant appeal, but many businesses and individuals throughout the Commonwealth. Parties in other cases will need guidance, and the lower courts need definitive answers in order to resolve future litigation. Governments of localities, municipalities, and the Commonwealth need to know how far they may go in regulating speech, expressive conduct, and other activities consistent with the Constitution. And, it cannot be emphasized enough, the issues raised herein are *not* limited solely to adult businesses and the like, but will likely affect what the lower court deemed "pure speech"–"speech for which we would send our sons and daughters off to war." For although the applications of regulations to speech in the "outer ambits" or "outer fringes" of "erotic" speech may differ in some cases from the

regulations of so-called pure speech, the interpretation and reach of the Kentucky Constitution and its protections on *all* speech affects potentially everyone in the Commonwealth.

Simply put, it is submitted that this Court should definitively answer the question of how Kentucky's Constitution is to be interpreted with regard to expressive activities and the right to liberty. Are the free speech protections enshrined in Section 8 of the Kentucky Constitution *more* protective than their federal counterparts in the First Amendment, as argued by Movants, as suggested by other states' interpretations of identical constitutional provisions, and as at least implied by this Court in *Wasson*? Or are they "consistent" with one another, protecting identical or nearly identical forms of speech, as held by the Court of Appeals in certain parts of its decision (*See, e.g.*, Opinion at p. 22)? Or, indeed, are the protections in the Kentucky Constitution much *less* stringent than their federal counterparts, meaning that Kentucky Courts will only protect free speech in the area of erotic expression because such legal principles are "foisted upon it" under the Supremacy Clause, as intimated in the Court of Appeals's Opinion at pages 87-88 and 23-24?

It is submitted that the answers to these questions may effectively resolve many of issues raised by Movants and may indeed answer many of the "questions of law" outlined above. Furthermore, with all due respect to the Court of Appeals, their Opinion evinces an open and blatant hostility to the *content* of the speech at issue which, it is submitted, unfortunately and prejudicially colored their analysis of the constitutional principles involved. As such, it is

respectfully submitted that a more objective analysis of the application of constitutional law to the Movants' speech should issue. And, finally, without going into detail regarding each of the "questions of law" presented above, it is simply submitted that, almost without exception, each and every question presents a profound and widely-applicatory issue of constitutional law and interpretation that should be resolved by this Court as the highest authority in the Commonwealth.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant discretionary review in this case.

Respectfully submitted,

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Counsel for Movants

RECORD ON MOTION

TABLE OF CONTENTS

app. pages	document
1-21	Opinion and Order of the Jefferson Circuit Court, Division Six, Case No. 04-CI-01967, issued December 14, 2004
22-110	Opinion Affirming in Part and Reversing in Part, Issued by the Commonwealth of Kentucky Court of Appeals on October 5, 2007, in consolidated case numbers Case NO. 2005-CA-000085-MR; Case No. 2005-CA-000090-MR; Case No. 2005-CA-000091-MR; Case No.2005-CA-000092-MR; Case No. 2005-CA-000100-MR; Case No. 2005-CA-000113-MR; AND Case No. 2005-CA-000176-MR

[*Proof of Service omitted in printing this appendix*]

APPENDIX J

SUPREME COURT OF KENTUCKY

2007-SC-0812-D
(2005-CA-0085, 2005-CA-0090, 2005-CA-0091, 2005-CA-0092, 2005-CA-0100, 2005-CA-0113 & 2005-CA-0176)

[Filed April 16, 2008]

CAM I, INC.,	)
D/B/A PRESTON VIDEO, ET AL.	)
	)
MOVANTS	)
	)
V.	)
	)
LOUISIVILLE/JEFFERSON COUNTY	)
METRO GOVERNMENT	)
	)
RESPONDENT	)
	)

JEFFERSON CIRCUIT COURT
NO. 2004-CI-1967

ORDER GRANTING DISCRECTIONARY REVIEW

The motion for review of the decision of the Court of Appeals is granted. While the parties are free to include all preserved issues in their briefs, the Court is particularly interested in any Twenty First

Amendment issues raised by the prohibition on alcohol, as well as the constitutionality of the principal owner disclosure provision and the "no touching" provision.

The Clerk of the Court of Appeals is directed to transfer to the Clerk of the Supreme Court the entire record in this proceeding.

Further briefing shall proceed in conformity with CR 76.12, the appellant's brief to be filed within sixty (60) days of the entry of this order.

ENTERED April 16, 2008.

/s/ Joseph E. Lambert
CHIEF JUSTICE

APPENDIX K

COMMONWEALTH OF KENTUCKY
SUPREME COURT

NO. 2007-SC-000812-D

[Filed June 24, 2008]

CAM I, INC.,	)
D/B/A PRESTON VIDEO, et al,	)
MOVANTS-APPELLANTS	)
	)
v.	)
	)
LOUISVILLE/JEFFERSON COUNTY	)
METRO GOVERNMENT,	)
RESPONDENT-APPELLEE	)
	)

ON APPEAL FROM
THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2005-CA-000085-MR;
No. 2005-CA-000090-MR;
No. 2005-CA-000091-MR;
No. 2005-CA-000092-MR;
No. 2005-CA-000100-MR;
No. 2005-CA 000113-MR;
AND
No. 2005-CA-000176-MR

APPEAL FROM JEFFERSON CIRCUIT COURT
DIVISION SIX (6)
NOW KNOWN AS DIVISION FIVE (5)
CASE NO. 04-CI-01967

BRIEF OF MOVANTS-APPELLANTS AND APPENDICES A - Q IN SUPPORT THEREOF

Certificate of Service Required by CR 76.12(6):

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by UPS Next Day Air with postage prepaid on June 24, 2008: Honorable N. Scott Lilly, Honorable William P. O'Brien, Honorable Scott D. Bergthold, Honorable H. Louis Sirkin, Honorable Bradley J. Shafer, Honorable Allan S. Rubin, Honorable C. Michael Hatzell, Honorable Jeremy A. Rosenbaum, Honorable J. Michael Murray, Honorable Ronald L. Cook, Honorable David S. Stevenson, Honorable E. Brian Davis, Honorable Paul S. Gold, Honorable Stephen P. Ryan, Honorable Jack Conway, and Clerk, Kentucky Court of Appeals.

_____
Frank Mascagni III

INTRODUCTION

Plaintiffs appeal from the Court of Appeals' decision affirming a circuit court's ruling on a challenge brought under the Kentucky Constitution against a Louisville/Jefferson County Metro Government ordinance that provides for the licensing and regulation of "adult entertainment establishments," where the ruling: 1) vacated a previously entered restraining order; 2) denied Plaintiffs' motion for a temporary injunction; and 3) with two small exceptions, granted the Defendants' motion for summary judgment. Plaintiffs further appeal from the Court of Appeals' decision reversing the circuit court's ruling on the two provisions it found to be unconstitutional.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the importance of the constitutional claims at issue in this case, many of which involve matters of first impression related to the interpretation of provisions of the Kentucky Constitution, Plaintiffs respectfully request that oral arguments be heard. Oral argument is particularly warranted because of the inability of the United States Supreme Court to articulate clear and usable standards for the application of analogous provisions of the Federal Constitution in regard to the matters at issue here. Plaintiffs respectfully request 45 minutes to present their arguments in light of: 1) the number and complexity of the constitutional issues that are raised in this action; and 2) the business diversity of Plaintiffs creating certain conflicts of interest among them in regard to the constitutional issues raised here, which will necessitate more than one attorney arguing the positions of the various Plaintiffs.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

STATEMENT OF THE CASE 1

Metro Government Code of Ordinances – Chapter 111 . . . . . passim

ARGUMENT 4

I. Because Chapter 111 Is Infirm Under The Kentucky Constitution, The Court Of Appeals Erred In Affirming The Circuit Court's Ruling Which Granted Nearly The Entirety Of Defendant's Motion For Summary Judgment 4

A. Standard Of Review 4

Gosney v. Glenn, 163 S.W.3d 894 (Ky. Ct. App. 2005) 4

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364 (Ky. 2005) 4

Lucchese v. Sparks-Malone, PLLC, 44 S.W.3d 816 (Ky. App. 2001) 4

B. The Licensing Scheme Of Chapter 111 Effectuates An Impermissible Prior Restraint Upon Expression 4

Alexander v. City of St. Paul,
227 N.W.2d 370 (Minn. 1975) 10

Alexander v. United States,
509 U.S. 544 (1993) 11

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 10

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 11

City of Colorado Springs v. 2354, Inc.,
896 P.2d 272 (Colo.1995) 10

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 11

Commonwealth v. Brandenburg,
114 S.W.3d 830 (Ky. 2003) 5

Commonwealth v. Campbell,
117 S.W. 383 (Ky. Ct. App. 1909) 8

Commonwealth v. Wasson,
842 S.W.2d 487 (Ky. 1992) 5, 6

Dean v. Commonwealth,
777 S.W.2d 900 (Ky. 1989) 5

Hodgkin v. Kentucky Chamber of Commerce,
246 S.W.2d 1014 (Ky. Ct. App. 1952) 5

James v. Hines,
63 S.W.3d 602 (Ky. Ct. App. 1998) 5, 10

Kentucky Constitution ..... *passim*

Long v. 130 Market St. Gift & Novelty of Johnstown,
440 A.2d 517 (Pa. Super. Ct. 1982) 7

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 11

Metro Government Code of Ordinances – Chapter 111 ..... *passim*

Nightclubs, Inc. v. City of Paducah,
202 F.3d 884 (6th Cir. 2000) 4, 5

Near v. Minnesota,
283 U.S. 697 (1931) 5

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 7

Perrine v. Municipal Court,
488 P.2d 648 (Cal. 1971) 10

Rose v. Council for Better Educ., Inc.,
790 S.W.2d 186 (Ky. 1989) 5

Schultz v. City of Cumberland,
228 F.3d 831 (7th Cir. 2000) 10, 11

Seattle v. Bittner,
505 P.2d 126 (Wash. 1973) 10

Simon & Schuster, Inc. v. Crime Victims Bd.,
502 U.S. 105 (1991) 11

Tennessee v. Marshall,
859 S.W.2d 289 (Tenn. 1993) 8

The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.,
163 S.W.3d 408 (Ky. 2005) 5

The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism,
62 Temp. L. Rev. 541 (1989) 6

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308 (1980) 5, 11

William Goldman Theatres, Inc. v. Dana,
173 A.2d 59 (Pa. 1961) 8

Yeoman v. Commonwealth,
983 S.W.2d 459 (Ky. 1998) 5, 6

C. The Licensing Fees Are Unconstitutional 11

Broadway Books, Inc. v. Roberts,
642 F.Supp. 486 (E.D. Tenn 1986) 12

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 12

Kentucky Restaurant Concepts, Inc. v. City of Louisville,
209 F.Supp.2d 672 (W.D. Ky. 2002) 12

Metro Government Code of Ordinances – Chapter 111 ..... *passim*

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 12

D. The Infirmity Of The Licensing Scheme Invalidates The Ordinance In Its Entirety 13

Artistic Entertainment, Inc. v. City of Warner Robins,
331 F.3d 1996 (11th Cir. 2003) 13

City of Chicago Heights v. Public Service Co.,
97 N.E.2d 807 (Ill. 1951) 13

Ellwest Stereo Theater, Inc. v. Boner,
718 F.Supp. 1553 (M.D. Tenn. 1989) 13

Kentucky Restaurant Concepts, Inc. v. City of Louisville,
209 F.Supp.2d 672 (W.D. Ky. 2002) 13

E. The Anti-Nudity Provision And The Articulated Governmental Basis For The Enactment Of The Ordinance Violate The Kentucky Constitution .. 14

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 14-17

Bellanca v. New York State Liquor Auth.,
429 N.E.2d 765 (N.Y. 1981), cert. denied, 456 U.S. 1006 (1982) 16

City of Erie v. Pap's, A.M.,
529 U.S. 277 (2000) (Pap's II) 14-16

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 15, 17

City of Nyssa v. Dufloth,
121 P.3d 639 (Or. 2005) 16

Hendricks v. Commonwealth,
865 S.W.2d 332 (Ky. 1993) 17

Jameson v. Commonwealth,
2004 WL 1752597 (Ky. Ct. App. 2004), rev'd 215
S.W.3d 9 (Ky. 2006) 17

Kentucky Constitution ..... *passim*

Marks v. United States,
430 U.S. 188 (1977) 15

Mendoza v. Licensing Board of Fall River,
827 N.E.2d 180 (Mass. 2005) 16

Metro Government Code of Ordinances -
Chapter 111 ..... *passim*

Mickens v. Kodiak,
640 P.2d 818 (Alaska 1982) 16

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 16

Pap's A.M. v. City of Erie,
719 A.2d 273 (Pa. 1998) (Pap's I) 16

Pap's A.M. v. City of Erie,
812 A.2d 591 (Pa. 2002) (Pap's III) 16-18

Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't,
60 S.W.3d 572 (Ky. Ct. App. 2001) 17

Triplett Grille, Inc. v. City of Akron,
40 F.3d 129 (6th Cir. 1994) 16

United States v. O'Brien,
391 U.S. 367 (1968) 15, 17, 18

F. The Hours Of Operation And "No Direct Payment" Provisions Are Constitutionally Invalid 19

729, Inc. v. Kenton County Fiscal Court,
515 F.3d 485 (6th Cir. 2008) 20

Alameda Books, Inc. v. City of Los Angeles,
Case No. CV 9507771 DDP (C.D.Cal. June 10, 2005) 23

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 19

Ben's Bar, Inc. v. Village of Somerset,
316 F.3d 702 (7th Cir. 2003) 20

Buckley v. Valeo,
424 U.S. 1 (1975) 21

Center for Fair Public Policy v. Maricopa County,
336 F.3d 1153 (9th Cir. 2003) 19, 21

City of Erie v. Pap's, A.M.,
529 U.S. 277 (2000) (Pap's II) 19, 22, 23

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 20, 21, 23

DiMa Corp. v. Town of Hallie,
185 F.3d 823 (7th Cir. 1999), cert. denied, 529
U.S. 1067 (2000) 22

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 22

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003), cert denied, 543
U.S. 812 (2004) 20

Hart Book Stores, Inc. v. Edmisten,
612 F.2d 821 (4th Cir. 1979), cert. denied, 447
U.S. 929 (1980) 21, 22

Marks v. United States,
430 U.S. 188 (1977) 20

Metro Government Code of Ordinances –
Chapter 111 ..... *passim*

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee
County,
337 F.3d 1251 (11th Cir. 2003), cert. denied, 541
U.S. 988 (2004) 20

Playboy Entertainment Group, Inc. v United
States,
30 F.Supp.2d 702 (D. Del. 1998) 22

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 23

Simon & Schuster, Inc. v. Crime Victims Bd.,
502 U.S. 105 (1991) 22

SOB, Inc. v. County of Benton,
317 F.3d 856 (8th Cir. 2003), cert. denied 541
U.S. 988 (2004) 20

Turner Broadcasting System, Inc. v. F.C.C.,
520 U.S. 180 (1997) 22

United States v. Nat'l Treasury Employees Union,
513 U.S. 454 (1995) 22

United States v. O'Brien,
391 U.S. 367 (1968) 19-21

United States v. Playboy Entertainment Group,
Inc.,
529 U.S. 803 (2000) 22

G. The Prohibition Of The Sale of Alcohol Is Unconstitutional 24

1. Metro Lacks Constitutional Authority To Unilaterally Impose New And Absolute Prohibitions On Alcohol Without Voter Approval .. 24

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 24, 26

Early v. Rains,
28 Ky.L.Rptr. 415, 89 S.W. 289 (1905) ... 24, 25

Iacobucci v. City of Newport, Kentucky,
785 F.2d 1354 (6th Cir. 1986), rev'd 479 U.S. 92
(1986) 25, 26

K.R.S. 25, 26

Kentucky Constitution ..... *passim*

Metro Government Code of Ordinances –
Chapter 111 ..... *passim*

New York State Liquor Auth. v. Bellanca,
452 U.S. 714 (1981) 26

Sammy's of Mobile, Ltd. v. City of Mobile,
140 F.3d 993 (11th Cir. 1998) 26

2. Even Assuming Metro Has Authority To Prohibit Alcohol Without Voter Approval, Section 111.30 Is Preempted By State Legislation .. 27

Boyle v. Campbell, Ky.,
450 S.W.2d 265 (1970) 27, 28

City of Ashland v. Kentucky Alcoholic Beverage
Control Bd.,
982 S.W.2d 210 (Ky. Ct. App. 1998) 27

Commonwealth v. Doe, Inc.,
674 S.W.2d 519 (1984) 27

K.R.S. 27

Ky. Licensed Beverage Ass'n v. Louisville-Jefferson County Metro Gov't,
127 S.W.3d 647 (Ky. 2004) 27, 28

Whitehead v. Estate of Bravard,
719 S.W.2d 720 (Ky. 1986) 27

3. Section 111.30 Imposes An Unconstitutional Condition On The Issuance Of A License 28

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 28

G&V Lounge, Inc. v. Michigan Liquor Control Commission,
23 F.3d 1071 (6th Cir. 1994) 28

Keyshian v. Board of Regents,
385 U.S. 589 (1967) 28

Perry v. Sinderman,
408 U.S. 593 (1972) 28

Sherbert v. Verner,
374 U.S. 398 (1963) 28

II. The Entertainment "Buffer Zone" Provisions Are Infirm Under The Kentucky Constitution 29

Metro Government Code of Ordinances –
Chapter 111 29

1. The Buffer Zone Does Not Pass Muster Under The Heightened Scrutiny Required By The Kentucky Constitution 29

City of Nyssa v. Dufloth,
121 P.3d 639 (Or. 2005) 29

Oregon v. Ciancanelli,
121 P.3d 613 (Or. 2005) 29

2. The Buffer Zone Provisions Are Unconstitutional As They Violate The State Right Of Association ... 30

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 31

Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County,
274 F.3d 377 (6th Cir. 2001), cert. denied, 535 U.S. 1073 (2002) 31

Kentucky Restaurant Concepts, Inc. v. City of Louisville,
209 F.Supp.2d 672 (W.D. Ky. 2002) 31

Metro Government Code of Ordinances – Chapter 111 ..... 31, 32

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 30, 31

3. The Buffer Zone Fails Muster Even Under Free Speech Intermediate Scrutiny 32

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 32

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 33

Commonwealth v. Ashcraft,
691 S.W.2d 229 (Ky. Ct. App. 1985) 32

DLS, Inc. v. City of Chattanooga,
107 F.3d 403 (6th Cir. 1997) 33

J.L. Spoons, Inc. v. City of Brunswick,
49 F.Supp.2d 1032 (N.D. Ohio 1999) 34

Metro Government Code of Ordinances –
Chapter 111 ..... 32, 33

United States v. O'Brien,
391 U.S. 367 (1968) 32, 34

I. The Restrictions Are Subject To Strict Constitutional Scrutiny And Do Not Pass Muster Under That Standard ... 34

United States v. O'Brien,
391 U.S. 367 (1968) 34

II. The Lower Courts Erred In Ruling That The Plaintiffs Lacked Standing To Raise A Number Of Constitutional Challenges .. 35

Carey v. Population Serv. Int'l,
431 U.S. 678 (1977) 36

Connection Distributing Co. v. Reno,
154 F.3d 281 (6th Cir. 1998), cert. denied, 526
U.S. 1087 (1999) 36

Craig v. Boren,
429 U.S. 190 (1976) 36

Hang On, Inc. v. City of Arlington,
65 F.3d 1248 (5th Cir. 1995) 36

Metro Government Code of Ordinances –
Chapter 111 . . . . . 34, 35

III. The Circuit Court Erred In Dismissing The Action Without Adjudicating No Less Than Six Of The Plaintiffs' Preliminary Injunction Arguments, And The Court Of Appeals Erred In Affirming 36

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 37

Allgeyer v. State of La.,
165 U.S. 578 (1897) 37

Cathy's Tap, Inc. v. Village of Mapleton,
5 F.Supp.2d 874 (C.D. Ill. 1999) 37, 38

City of Los Angeles v. Alameda Books, Inc., 535
U.S. 425 (2002) 38

Deja Vu of Nashville, Inc. v. Metropolitan
Government of Nashville and Davidson County,
274 F.3d 377 (6th Cir. 2001), cert. denied, 535
U.S. 1073 (2002) 37

Freedman v. Maryland,
380 U.S. 51 (1965) 37, 38

G&V Lounge, Inc. v. Michigan Liquor Control Commission,
23 F.3d 1071 (6th Cir. 1994) 37

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003), cert denied, 543 U.S. 812 (2004) 38

Kentucky Constitution 37

Kentucky Restaurant Concepts, Inc. v. City of Louisville,
209 F.Supp.2d 672 (W.D. Ky. 2002) 38

Lawrence v. Texas,
539 U.S. 578 (1897) 37

Metro Government Code of Ordinances – Chapter 111 36-38

R.V.S., LLC v. City of Rockford,
361 F.3d 402 (7th Cir. 2004) 38

T.K.'s Video, Inc. v. Denton County,
24 F.3d 705 (5th Cir. 1994) 37

IV. The Circuit Court Erred In Dismissing – And The Court Of Appeals Erred In Affirming – The Action Without Affording The Plaintiffs The Opportunity To Litigate Their "As Applied" Challenge To The "Secondary Effects" Justification For The Enactment Of The Ordinance 38

City of Erie v. Pap's, A.M.,
529 U.S. 277 (2000) (Pap's II) 39, 42

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 39, 41, 42

Jameson v. Commonwealth,
2004 WL 1752597 (Ky. Ct. App. 2004), rev'd 215
S.W.3d 9 (Ky. 2006) 40-42

Metro Government Code of Ordinances –
Chapter 111 38-42

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 38

V. The Circuit Court Should Have Entered A Temporary Injunction And Should Not Have Lifted The Restraining Order 42

Elrod v. Burns,
427 U.S. 347 (1976) 43

G&V Lounge, Inc. v. Michigan Liquor Control Commission,
23 F.3d 1071 (6th Cir. 1994) 43

James v. Hines,
63 S.W.3d 602 (Ky. Ct. App. 1998) 43

Maupin v. Stansbury,
575 S.W.2d 695 (Ky. App. 1978) 43

VI. The Principal Owner Disclosure Requirements Are Unconstitutional . 43

Acorn Investments, Inc. v. City of Seattle,
887 F.2d 219 (9th Cir. 1989) 43, 45

Buckley v. Valeo,
424 U.S. 1 (1975) 43, 45

East Brooks Books, Inc. v. City of Memphis,
48 F.3d 220 (6th Cir. 1995) 43, 44

Ellwest Stereo Theater, Inc. v. Boner,
718 F.Supp. 1553 (M.D. Tenn. 1989) 43, 44

Genusa v. City of Peoria,
619 F.2d 1203 (7th Cir. 1980) 43, 44

Kentucky Constitution 44

Lady J. Lingerie, Inc. v. City of Jacksonville, 176
F.3d 1358 (11th Cir. 1999) 45

McIntyre v. Ohio Elections Comm.,
514 U.S. 334 (1995) 44

Metro Government Code of Ordinances –
Chapter 111 43-45

N.A.A.C.P. v. Alabama ex rel Patterson,
357 U.S. 449 (1958) 43

Pentco, Inc. v. Moody,
474 F.Supp 1001 (S.D. Ohio 1978) 44

T.K.'s Video, Inc. v. Denton County,
24 F.3d 705 (5th Cir. 1994) 43

T-Marc, Inc. v. Pinellas County, Fla.,
804 F.Supp. 1500 (M.D. Fla. 1992) 43

Talley v. California,
362 U.S. 60 (1960) 43

United States v. O'Brien,
391 U.S. 367 (1968) 46

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,
536 U.S. 150 (2002) 44

VII. The "No-Touch" Provision Of Chapter 111 Is Unconstitutional 46

Allgeyer v. State of La.,
165 U.S. 578 (1897) 49

American Trucking Assoc. v. Commonwealth of Kentucky Transportation Cabinet,
676 S.W.2d 785 (Ky. 1984) 48

City of Chicago v. Morales,
527 U.S. 41 (1999) 50

Grayned v. City of Rockford,
408 U.S. 104 (1972) 47

Hatchett v. City of Glasgow,
340 S.W.2d 248 (Ky. Ct. App. 1960) 48

J.L. Spoons, Inc. v. City of Brunswick,
49 F.Supp.2d 1032 (N.D. Ohio 1999) 47

Kentucky Constitution 49

Lawrence v. Texas,
539 U.S. 578 (1897) 49

Metro Government Code of Ordinances –
Chapter 111 46-48

CONCLUSION 50

CERTIFICATE OF SERVICE 51

STATEMENT OF THE CASE

Plaintiff Kentucky Restaurant Concepts, d/b/a *PT's* ("*PT's*"), operates a liquor-licensed establishment in Louisville which presents to the consenting adult public a variety of female exotic performance dance entertainment where entertainers are at times clothed, at times "topless," and at other times fully nude. *PT's* has been open for business since February, 1997, and it is licensed to remain open and serve alcoholic beverages until 4:00 a.m. Complaint, ¶ 10; Circuit Court Record ("R.") Vol. I, pp. 1-44.

Blue Movies, Inc., d/b/a *Love Boutique* ("*Blue Movies*"), operates a retail facility in Louisville that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. *Blue Movies* has operated since 1982. Complaint, ¶ 11; R. Vol. I., pp. 1-44.

On March 1, 2004, Defendant Louisville/Jefferson County Metropolitan Government ("Metro") enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance"; Apx. D). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); it requires a $1,000.00 annual

licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(c)), and requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and provides for penalties for violating the Ordinance - - in addition to license suspension and/or revocation - - which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 or more than $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

Plaintiffs filed suit on March 5, 2004, challenging the Ordinance on numerous state constitutional

grounds. At the same time, they filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction. The bases of the constitutional attacks against Chapter 111 are set forth in Plaintiffs' complaint (R. Vol. I, pp. 1-44), and the matters at issue in the various motions which resulted in the dismissal of the lawsuit below are found in the Summary and Outline of Constitutional Challenges to Chapter 111. R. Vol. III, pp. 410-30; Apx. E.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. R.Vol. I, p. 52; Apx. F. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. R. Vol. III, pp. 358-61; Apx. J. Plaintiffs' Motion for Temporary Injunction was left pending.[2]

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[1] These arguments can be discerned in detail from Plaintiffs' Brief in Support of Motion for Temporary Injunction ("Brief"), filed March 5, 2004; Plaintiffs' Response to Motion for Summary Judgment (R. Vol. III, pp. 433-49); and Plaintiffs' Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order ("Supp. Brief"), filed August 4, 2004.

[2] In June and July of 2004, the other Appellants/Counter-Appellees were granted permission to intervene as plaintiffs. Those businesses fell into two categories. First were Cam I, Inc., d/b/a *Preston Video*; Blue Sky Video, Inc.; Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*; Pure Pleasure Mega Center, LLC; American Pride VI, Inc., d/b/a Lion's Den Adult Superstore; Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*; and TBC, Inc., d/b/a *Metro Station*, which are all retail facilities that present, sell and rent to the consenting adult public a variety of non-obscene but sexually explicit expressive

Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89) while the case was in federal court (after Metro had filed a notice of removal but before the federal district court entered an order of remand), and then later filed a motion for summary judgment. R. Vol. II, pp. 148-241. The motion to dissolve was later "passed to the trial date." (Order, R. Vol. III, pp. 347-50; Apx. I). Pending before the circuit court were therefore: 1) Plaintiffs' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the restraining order; granting Defendant's motion for summary judgment as to all issues except for

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materials. Second were Danny's Inc., d/b/a *Thorobred II*; Entertainment Enterprises, Inc., d/b/a *The Godfather*; Gold Coast, Inc., d/b/a *Thorobred III*; Hayes Entertainment, Inc., d/b/a *Thorobred IV*; LLL, Inc., d/b/a *Greenlight Lounge*; Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*; Riverview Entertainment, Inc., d/b/a *Thorobred VI*; South Dixie Entertainment, Inc., d/b/a *Thorobred VII*; Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; Teddy's Inc., d/b/a *Thorobred V*; Thorobred, Inc., d/b/a *Thorobred Lounge*; Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*; Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*, all of which are liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license) that present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude. All of these parties are referred to hereinafter simply as "Plaintiffs."

§ 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Plaintiffs' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. R. Vol. VII, pp. 942-62; Apx. C. The circuit court granted virtually complete summary judgment to the Defendant: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

Plaintiffs timely filed Notices of Appeal, and Metro filed a cross-appeal regarding the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). On October 5, 2007, the Court of Appeals issued a 89 page decision, affirming each and every ruling of the circuit court adverse to the Plaintiffs, and reversing the circuit court on the two cross-appeal issues. Apx. A. The Plaintiffs then filed a motion for discretionary review to this Court, which was granted on April 16, 2008. Apx. B. This appeal follows.

ARGUMENT

I. BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING WHICH GRANTED NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

The standard of review regarding a grant of summary judgment is:

> [W]hether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. [ ]Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. In ruling on a motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion.

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 366 (Ky. 2005) (citations omitted). Moreover, "[t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue." *Lucchese v. Sparks-Malone, P.L.L.C.*, 44 S.W.3d 816, 817 (Ky. App. 2001). Finally, conclusions of law, which are the rulings at issue here, are subject to "independent *de novo* appellate determination." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. Ct. App. 2005).

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION.

"A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000), *overruled on other grounds.*[3] *See also Near v. Minnesota*, 283 U.S. 697, 713 n. 13 (1931). Under federal jurisprudence, "[a]ny system of prior restraints of expression comes to this Court bearing a ***heavy presumption against its constitutional validity***." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (emphasis added). *Accord James v. Hines*, 63 S.W.3d 602, 606 (Ky. Ct. App. 1998), *appeal dismissed* ("Prior restraint on speech is ***presumptively unconstitutional***") (emphasis added). These limitations upon the prior restraint of speech and expression should be of concern to this Court for the following reasons.

First, this Court has often declared that the State Constitution affords broader protections than the Federal Constitution.[4] This is because:

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[3] Although Plaintiffs' claims were predicated solely upon the Kentucky Constitution, they will cite to federal precedent as state rights cannot fall below the minimum guarantees of rights under the United States Constitution. *The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 417-18 (Ky. 2005).

[4] *See, e.g., Commonwealth v. Brandenburg*, 114 S.W.3d 830, 835 (Ky. 2003) (court has right to "enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution"); *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998) ("privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States

> Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution. . . . [W]hile there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical. . . . Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties *significantly greater than the selective list of rights addressed by the Federal Bill of Rights*.

Commonwealth v. Wasson, 842 S.W.2d 487, 492, 494 (Ky. 1992) (invalidating the states sodomy law based on privacy grounds) (emphasis added).

Here, Ky. Const. §§ 1, 2, 8 and 26 contain language far broader than the First Amendment. Indeed, the Kentucky Constitution protects the freedom of speech and communication in not one, but two separate provisions. Ky. Const. §§ 1(Fourth) and 8. In addition, there is the broad limitation upon government as set forth in Ky. Const. § 26. This demonstrates that Kentucky has indeed chosen the broadest protections for expression that are possible. Moreover, this Court should not consider the textual difference between the Federal and State Constitutions to be insignificant. Indeed, "each word in the Constitution should be given

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Constitution"); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* (right of confrontation broader); and *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (finding a fundamental right to public education, even though the U.S. Supreme Court had rejected just such an argument).

meaning and effect. . . ." *Hodgkin v. Kentucky Chamber of Commerce*, 246 S.W.2d 1014, 1016 (Ky. Ct. App. 1952). This admonition should be kept in mind when considering the precedent below which discusses the literal differences between the federal and state constitutional provisions at issue.

Second, and more specifically, the ***Pennsylvania*** Constitution has been interpreted to afford extremely broad protections against prior restraints. This is important because a"comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, ***demonstrates unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790***." *Wasson*, 842 S.W.2d at 492 (emphasis added).

Accordingly, as succinctly stated by this Court, "Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are ***uniquely persuasive*** in interpreting our own." *Id.* at 498 (emphasis added). [5]

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[5] *See also Yeoman*, 983 S.W.2d at 473 ("decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are ***very persuasive*** to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives") (emphasis added); and Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541 (1989)(influence is remarkable).

At the time of adoption of the Kentucky Constitution, as well as the federal constitution and the constitution of the State of Pennsylvania, there were two philosophical approaches to the freedoms of speech and the press. The more limited was the Blackstone view that freedom of speech meant only freedom from prior restraint. Under Blackstone's view, there could, however, be punishment for the "abuse" of that liberty. The other was a natural rights philosophy advanced in the works of John Locke, which taught that freedom of speech was an "inalienable" natural right that was always retained by the individual, limited only by the fundamental rights of others. A detailed discussion of these competing theories is found in the recent decision of the *Oregon Supreme Court in Oregon v. Ciancanelli*, 121 P.3d 613, 620 (Or. 2005).

It is beyond question that Kentucky has chosen the broadest protections possible by blending these two philosophical approaches into the State Constitution. Certainly, Ky. Const. § 1 contains natural rights attributes (its refers to the "***inalienable*** rights" of men to "freely communicate their thoughts and opinions" (emphasis added)). In addition, in also adopting a Blackstonian approach to these liberties, the Framers drafted Ky. Const. § 8 to protect the "free and full" right to speak, write and print "on any subject," while holding individuals "responsible for the abuse of that liberty."[6]

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[6] The Court of Appeals below was misguided in its ruling in this case by its vehement dislike for adult establishments, very clearly holding that if it were up to the Court of Appeals, this type of expression would be granted no constitutional protections at all. Apx. A, p. 87 ("Simply because United States Supreme Court case

Similarly, it is clear that the framers of the Pennsylvania constitution chose broad protections against prior restraints as well. In *Long v. 130 Market St. Gift & Novelty of Johnstown*, 440 A.2d 517, 525 (Pa. Super. Ct.1982), the Superior Court of Pennsylvania noted that Blackstone's approach had become part of the "bedrock of Pennsylvania's constitutional system," and that under their state constitution, there were two distinct elements to the right of freedom of expression. "The first, ***arguably an absolute right***, guarantees to each citizen the freedom to make public whatever he may choose. *The prohibition against the prior restraint of publication*

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law ***has thrust upon us a mandate that erotic expression deserves at least minimal First Amendment protection***, this does not mean that all activities taking place in such an environment are likewise protected") (emphasis added); and Apx. A, p. 88 ("Without the mandate by federal jurisprudence that we grant such protection, meaning that Kentucky's Constitution can give no lesser protection to this form of alleged expression, it is ***not evident that Kentucky would grant any protection at all to erotic expression if we had the choice***.") (emphasis added). It should be noted that Court of Appeals issued its decision without viewing one item of merchandise or a single performance presented in Plaintiffs' establishments upon which to base its opinion that those forms of expression are not protected.

serves to protect the sanctity of this right."[7] *Id.* (emphasis added).

The Pennsylvania Supreme Court concurs in these comments. In *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961), the High Court, in addressing the interpretation of the Pennsylvania constitutional right of free expression as a matter of first impression,[8] succinctly held that "it is clear enough that what it was designed to do was to *prohibit the imposition of prior restraints upon the communication of thoughts and opinions*, leaving the utterer liable ***only*** for the abuse of the privilege" *Id.* at 62 (emphasis added). In discussing the renowned Blackstone Commentaries and the prohibition against prior restraints, the Pennsylvania Supreme Court further observed that what Blackstone had recognized as the law of England came to be "an established

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[7] The second distinct element to the right of freedom of expression under the Pennsylvania and Kentucky constitutions is the responsibility "for the abuse of that liberty." The court in *Long* further noted that "[i]t would seem that the right to ***trial by jury . . . protects the sanctity of this more limited right***." *Long*, 440 A.2d at 525 (emphasis added). However, there is no right to trial by jury with regard to the criminal disability provisions of Chapter 111 further discussed, *infra*, which can effectuate an absolute prior restraint upon expression. Rather, the Director, and not a jury, makes the decision that an individual or business is precluded from engaging in protected expression in the Louisville/Jefferson County area. Because the Ordinance does not require a determination by jury of penalties under Chapter 111 (including license suspension and/or revocation), the Ordinance is constitutionally infirm for this additional reason.

[8] As will be discussed further herein, that provision served as the basis for the rights found in Ky. Const. § 8.

constitutional right in Pennsylvania as to both speech and press. . . ."

Accordingly, the Pennsylvania courts have acknowledged the "***arguably . . . absolute right***" to be free from prior restraints. This Court should recognize and indeed follow this "uniquely persuasive" precedent from the State of Pennsylvania.[9] *See also Commonwealth v. Campbell*, 117 S.W. 383, 385-86 (Ky. Ct. App. 1909) (the court of appeals following the Blackstone approach in differentiating between absolute and relative rights).

Therefore, because Chapter 111 is clearly a prior restraint (in that no one can engage in the defined conduct within the county without prior governmental approval from the Director), it is invalid in-and-of itself under the plain language of the Kentucky Constitution. The Court of Appeals was in error in rejecting this argument. Apx. A, p. 53. Yet, an

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[9] Tennessee, whose constitution was also borrowed "***in virtually identical form***" from the Pennsylvania constitution, has also recognized the broad prohibitions against prior restraints (an "arguably absolute right") by directly and liberally quoting from *Long* in *Tennessee v. Marshall*, 859 S.W.2d 289, 293 (Tenn. 1993). That court further observed, in adopting the Pennsylvania approach, that "[t]here is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee's Constitutional Convention in 1796 intended, when they adopted, ***verbatim***, the language that was contained in Article 9,§ 7 of the Pennsylvania Constitution of 1790, *that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.*" *Id.* at 294 (emphasis added).

additional facet of the Ordinance further makes this point.

In order to obtain an adult entertainment establishment license, each principal owner, officer, director, general partner, and "each other person who will participate directly in decisions relating to management of the business" must be identified in the application and must list thereon all convictions for "specified criminal activities as defined in this Chapter. . . ." § 111.36(B)(2)(b) and (6).

An application for an adult entertainment establishment license is to be denied if the "applicant" has been convicted of a "specified criminal activity. . . ." § 111.38(A)(4).[10] In addition, *each and every person employed at an adult establishment must obtain an employee license prior to working -- **even janitors***! *See* generally § 111.40(D) and § 111.42(A). An employee license must also be denied if the Director determines that the employee applicant has been convicted of a "specified criminal activity." § 111.42(B). Interestingly, while this restriction parrots the requirement for club licenses, employee applicants are ***not*** – for whatever reason – obligated to

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[10] These include the crimes of rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and even offenses relating to controlled substances. § 111.02. Such convictions preclude licensing for two years from the date of a conviction for a misdemeanor offense; five years from the date of a felony conviction; and five years from the date of the last conviction of two or more misdemeanor offenses occurring within any twenty-four month period. § 111.02.

disclose any such convictions on their applications. *See, e.g.*, § 111.42(A)(1)-(7).

Any license may be suspended if the licensee "knowingly or recklessly violated or is not in compliance with any section of this chapter. . . ." § 111.43(A). A license may be revoked if the licensee "knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period," § 111.43(B), or for a single instance of certain criminal conduct. § 111.43(C). The fact that a conviction is being appealed "shall have no effect on the revocation of the license. . . ." § 111.43(D). A license revocation is effective for ***one year***. § 111.43(E). All of these sections of Chapter 111, in combination, will be referred to hereinafter as the "***criminal disability provisions***" of the Ordinance.

The circuit court upheld these restrictions, R. Vol. VII, pp. 942-62; Apx. C, pp. 6-7, and held that Plaintiffs did not have standing to challenge them.[11] *Id.* at 7. The appellate court affirmed, also finding a lack of standing. Apx. A, pp. 61-62. However, the criminal disability provisions are unquestionably prior restraints upon expression, and accordingly fail to pass muster under the Kentucky Constitution.

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[11] Plaintiffs have standing because they're required to pay the application fees used to defray the costs of the criminal background checks which facilitate administration of the criminal disability provisions. *See* Section I(C), *infra*. In addition, all "applicants" must forego their privacy rights and provide certain personal information and submit to background check; again conferring standing to challenge these provisions.

First, since prior restraints should not be permitted ***at all*** under the Kentucky Constitution, these provisions are invalid. They disenfranchise certain individuals and businesses from engaging in expression-related activities, and therefore unquestionably effectuate an impermissible prior restraint. Indeed, supreme courts of a number of states have come to the conclusion that these types of criminal disability provisions are constitutionally infirm.[12]

Second, there is also federal precedent that establishes the infirmity of such restrictions. Most telling is the recent Seventh Circuit decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), where that Circuit succinctly concluded:

> "We know of no doctrine that permits the state to deny to a person First Amendment liberties

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[12] *See, e.g., Perrine v. Municipal Court*, 488 P.2d 648, 652 (Cal. 1971) (ordinance unconstitutional as no showing had been made that persons convicted of specifically articulated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 288-89 (Colo. 1995); *Seattle v. Bittner*, 505 P.2d 126, 131 (Wash. 1973); and *Alexander v. City of St. Paul*, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of such provisions which effectuated a prior restraint could be overcome only upon a showing that the operation of a business would present a "clear and present danger" of a substantive evil). *See also James*, 63 S.W.3d at 606 ("Prior restraint must be supported by findings that a 'clear and present danger of actual prejudice or an imminent threat' to the defendant is present").

> other than the right to vote solely because that person was once convicted of a crime or other offense."... these license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***."[13]

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[13] Consequently, criminal disability provisions such as are found in Chapter 111 ***cannot*** be justified upon a concern of "adverse secondary effects" as is the stated purpose of this Ordinance. *See* further discussion in Section IV, *infra*. While the United States Supreme Court has never directly ruled on the validity of these types of disability provisions, a number of its decisions, and in particular those dealing with "adult" entertainment, certainly imply that they would be ruled unconstitutional. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 n.2 (Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint since respondents were "free to carry on their bookselling business at another location," which would not be the case here where the disabled individuals and businesses are precluded from engaging in protected activities anywhere in the County); *Alexander v. United States*, 509 U.S. 544, 551 (1993) (Court concluded that the forfeiture provisions of the federal RICO statute did not violate the First Amendment as it "impose[d] no legal impediment to--no prior restraint on--petitioner's ability to engage in any expressive activity he chooses" (clarification added) whereas Chapter 111 violates this doctrine by imposing an absolute "legal impediment" to constitutionally protected expressive conduct); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434-42 (2002) (plurality) (Justice Kennedy, in his critical concurring opinion (discussed, *infra*), observed that a municipality may not attempt to address a concern of secondary effects by "suppressing the

228 F.3d at 852-53 (emphasis added, citations omitted).

Here, although the preambles to Chapter 111 do not articulate any reason for engrafting the criminal disability provisions on to the Ordinance (a constitutional failing in-and-of-itself), it is clear that the only basis for these prohibitions could be the conclusion that people who were convicted of crimes in the past would be more likely to engage in such conduct in the future. As is aptly demonstrated above, however, Metro should not be permitted to effectuate such impermissible prior restraints.

C. THE LICENSING FEES ARE UNCONSTITUTIONAL.

The annual fee for an adult entertainment establishment license is $1,000.00. § 111.41. For an employee license, it is $25.00 per year. § 111.42(B). It

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speech itself." To be constitutional, the law must instead "leave the quantity and accessibility of speech substantially undiminished"). *See also Vance*, 445 U.S. at 317 (Prohibition of the future exhibition of films previously found to be obscene found unconstitutional as the future conduct was protected); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (Previous misconduct or prior illegal activity by anti-abortion protesters could not serve as a basis to deprive them of their right to engage in current and future First Amendment activities); *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991) (Individuals convicted of heinous crimes, such as murder, could not be deprived of their First Amendment rights to author, publish, and receive royalties from books describing their criminal activities); and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("[T]he prospect of crime" does not justify laws suppressing protected speech).

is clear that the purpose of these fees is, at least in part, to defray the costs of the ***background checks*** necessary to enforce the criminal disability provisions. *See, e.g.*, § 111.42(B) ("Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this Chapter"). Given that the criminal disability provisions are infirm for the reasons as set forth above, the license fees are unconstitutional as well.

As a basic premise, a state may not impose a charge upon the exercise of a constitutional right. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Nevertheless, under federal analysis, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 493 (E.D. Tenn. 1986).[14] The fee should be

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[14] Whether municipalities can impose a particular licensing fee under federal jurisprudence only against "adult" businesses is now open to question. *See Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax"). As will be discussed, *infra*, Justice Kennedy's concurring opinion has been determined to be the "holding" of *Alameda Books*. In addition, the protections against prior restraints as embodied in the Kentucky Constitution would also seem to exclude the notion that the engagement in constitutionally protected activities can be made contingent upon the payment of a fee. Accordingly, the fees as set forth in the challenged Ordinance may be unconstitutional in-and-of-them-

as minimal as necessary to meet the cost to the city. *Id.* The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is indeed as potent as the power of censorship." *Murdock*, 319 U.S. at 113 (clarification added).

The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme *lies with the licensing authority. See, e.g., Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down fees, "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme").

If the criminal disability provisions of the Ordinance are unconstitutional, so clearly then are the application/licensing fees, which are specifically predicated upon administering the criminal disability components of Chapter 111. While the circuit court found that Metro had substantiated the amount of these fees by way of affidavit (Apx. C, p. 6), which was affirmed by the Court of Appeals (Apx. A, p. 55), the lower court decisions were, of course, predicated upon the upholding of the criminal disability provisions. If they are infirm, all of the costs associated with administering those provisions – which are indeed the lion's share of the licensing fees – are similarly unjustified, which negates the permissibility of these fees.

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selves, irrespective of the other matters discussed in this subsection.

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY.

Although Chapter 111 contains a severability provision (§ 111.98), the invalidity of the licensing scheme renders the ordinance invalid in its entirety. The district court decision in *Kentucky Restaurant Concepts*, is particularly illuminating as it involved the predecessor adult entertainment establishment ordinance. The court there held that:

> "As a practical matter, however, partial operation of Chapter 111 post-severance is untenable. The Ordinance's basic purpose is to regulate sexually oriented businesses. Its primary method for doing so is its licensing and enforcement scheme. Although the Ordinance's substantive provisions are constitutional, they are actually but minor subsets of the broader licensing requirement. . . . If the City may not deny or revoke licenses - - the fundamental regulatory mechanism upon which the Ordinance is structured - - then enforcement of the Ordinance is impossible."

209 F. Supp.2d at 701. *Accord Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003). The same circumstances apply here, and the circuit court should therefore have enjoined the enforcement of the entire Ordinance, or the Court of Appeals should have reversed that holding.

In addition, because the licensing fees are unconstitutional, the entire Ordinance must be enjoined. *See, e.g., Ellwest Stereo Theater, Inc. v.*

Boner, 718 F.Supp. 1553, 1574-75, and 1581-82 (M.D. Tenn. 1989) (invalidation of numerous provisions of an adult business licensing ordinance – including the fee provision – rendered it impossible to sever, thereby requiring the entire ordinance to be enjoined); and *City of Chicago Heights v. Public Service Co.*, 97 N.E.2d 807, 811 (Ill. 1951) (invalidation of licensing fees associated with an ordinance regulating the location and construction of poles, wires, and main electrical lines in streets and other public places rendered the entirety of the ordinance unconstitutional, as the impermissible fee provisions were not severable in that the duties imposed upon the municipal agency "must be performed without reimbursement to the City because the license and permit fees provided for are excessive and void"). Here, Metro certainly did not intend the ***County*** to pay for the costs of administering this Ordinance, and since the fee provisions are therefore infirm, so is the entirety of Chapter 111.

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION.

Section 111.35(A) provides that it is a violation of the Chapter "for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, appear in a *state of nudity, regardless of whether such public nudity is*

expressive in nature."[15] (Emphasis added). The phrase "state of nudity" is basically defined as a person appearing in clothing of something ***less than*** pasties and a G-string. *See* § 111.02 ("NUDITY OR STATE OF NUDITY"[16]). Accordingly, under the Ordinance, entertainers must wear at least pasties and a G-string at all times. ***Under Chapter 111, then, there is to be no fully nude dancing, or even "topless" entertainment, within the County.***

This restriction, and indeed Chapter 111 in its entirety, was enacted upon a purported concern of the "adverse secondary effects" of adult entertainment establishments. § 111.01. While discussed in greater detail in Section IV, *infra*, this doctrine, and indeed the ability to preclude nude entertainment under federal jurisprudence, has been the subject of a rash of highly-fractured plurality opinions from the Supreme Court. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (three Member plurality concluding that an anti-nudity statute could be justified upon the morality of society); *City of Erie v. Pap's, A.M.*, 529 U.S. 277 (2000) ("*Pap's II*") (five Justices, in two opinions, concluding that an ordinance proscribing public nudity could be justified upon the adverse secondary effects of

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[15] Plaintiffs do not challenge this provision in regard to non-expressive nudity, but rather merely assert that the ban on "expressive" nudity is unconstitutional. Non-expressive public nudity is already prohibited by law. *See* K.R.S. § 510.150(1)

[16] This is defined as the "showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a full opaque covering of any part of the nipple and areola."

adult entertainment establishments, but with no majority of Justices agreeing upon the evidentiary standards to apply in such circumstances); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (fragmented Court discussing the evidentiary burden upon the government in order to substantiate a regulation enacted upon a purported concern of adverse secondary effects). These cases all concluded, however, that in the particular circumstances presented, the Court would apply an intermediate level of constitutional scrutiny pursuant to a four part test as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[17]

In its opinion, the Court of Appeals analyzed the constitutionality of Chapter 111 under the *O'Brien* standards (Apx. A, pp. 29-33), as did the circuit court. R. Vol. VII, pp. 942-62; Apx. C, p. 4. The circuit court found that this test was the appropriate level of review for determining the constitutionality of the Ordinance "given its stated justification to decrease secondary effects," (R. Vol. VII, pp. 942-62; Apx. C, p. 4.), a holding affirmed by the Court of Appeals. Apx. A, pp. 31-32. Plaintiffs contend that secondary effects is not a permissible basis to reduce the level of constitutional scrutiny under the Kentucky Constitution, and that reference to Pennsylvania law is once again necessary in arriving at this conclusion.

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[17] 1) the regulation at issue is within the government's constitutional power; 2) the regulation furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

In the years following *Barnes*, courts quickly observed irreconcilable nature of the various opinions of the Justices. In applying the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'"), the Sixth Circuit observed that those standards were less helpful in a case where the opinions were so divergent, and the appellate court referred to its job as "reading the tea leaves of Barnes." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

In 1998, the Pennsylvania Supreme Court was squarely faced with the Barnes dilemma in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*"). Finding *Barnes* "hopelessly fragmented" (*Pap's I*, 719 A.2d at 277), that court concluded that the anti-nudity ordinance at issue before it was subject to strict constitutional scrutiny and was unconstitutional ***under the First Amendment***. *Id.* at 278-280. The Supreme Court reversed in yet another plurality decision. *Pap's II*, 529 U.S. 277.

The Supreme Court remanded to the Pennsylvania Supreme Court for a determination of the plaintiffs' overbreadth and state constitutional claims. *Pap's II*, 529 U.S. at 286, 302. In its decision, reported as *Pap's A.M. v. City of Erie*, 812 A.2d 591, 613 (Pa. 2002) ("*Pap's III*"), *the Supreme Court of Pennsylvania adjudicated the exact same issue facing this Court with regard to Chapter 111; that being whether an anti-nudity provision which impacts upon expressive entertainment is consistent with the state constitutional*

right of freedom of speech and expression. The Pennsylvania Supreme Court, with only a single dissent, concluded that it was not.[18] The decision in *Pap's III* is critical here because, as previously stated, ***the Pennsylvania Constitution served as the basis of the Kentucky Constitution***.

Upon remand, the Pennsylvania Supreme Court concluded that the anti-nudity ordinance at issue there – ***predicated upon a supposed concern of "secondary effects"*** (as is Chapter 111) – violated

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[18] *Accord Mendoza v. Licensing Board of Fall River*, 827 N.E.2d 180 (Mass. 2005), where the Massachusetts Supreme Court recently ruled an anti-nudity ordinance unconstitutional, even in the face of the type of secondary effects "evidence" submitted with regard to the enactment of Chapter 111. *Id.* at 189 n. 13. That court observed that the focus on "secondary effects" evidence "seems a strong indicator that the ordinance is directed at the form of nudity common in adult entertainment." *Id.* The court therefore concluded that the ordinance was unconstitutional as a ban on protected expression. *Id.* at 198-99. Equally as important, the High Court of Massachusetts noted that in exercising its independent judgment to "uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law," *id.* at 191, it was following prior decisions of other state supreme courts, including *Pap's III*, *Mickens v. Kodiak*, 640 P.2d 818, 821-23 (Alaska 1982); and *Bellanca v. New York State Liquor Auth.*, 429 N.E.2d 765 (N.Y. 1981). *See also City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005), and *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005), where the Oregon Supreme Court, in applying their state constitutional right of freedom of expression (markedly similar to that at issue here and also similar to the Pennsylvania right – *Ciancanelli*, 121 P.3d at 634-35) declined to analyze various restrictions of exotic performance dance entertainment under any form of intermediate scrutiny by rejecting a secondary effects justification for such provisions. *See Nyssa*, 121 P.3d at 644 (De Muniz, J., dissenting)). These are discussed in further detail in Section I(H)(1), *infra*.

Article 1,§ 7 of their state constitution. The court rejected the intermediate scrutiny standard of *O'Brien*, and held that it must apply strict scrutiny, requiring the city to "establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" *Pap's III*, 812 A.2d at 612.

The Pennsylvania Supreme Court noted that freedom of expression had a "robust constitutional history" in that state. *Id.* at 603-05. Probably most importantly, it stated that:

> "***As purely textural matter, Article I, § 7 is broader than the First Amendment*** in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the ***free communication of thoughts and opinions***, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. ***'Communication' is obviously broader than 'speech.'***"

Id. at 603 (emphasis added).

Certainly, the same is true here. Ky. Const. § 1 articulates that citizens are imbued with the right of "***freely communicating their thoughts and opinions***," and Ky. Const. § 8 protects the freedom to speak on "any subject." That is not to even mention the broad protections afforded by Ky. Const. § 26. Consequently, the same rights should apply here.[19]

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[19] Such a conclusion is not foreclosed by the decision in *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993). There, this Court upheld a municipal anti-nudity ordinance challenged by a nude

In addition, in particular regard to the highly fractured plurality opinion in *Alameda Books*, by which any "secondary effects" analysis under the Federal Constitution must be governed, the High Court of Pennsylvania observed: "It is also notable that the five Justices in the U.S. Supreme Court who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing which would be required to satisfy that test.***"[20] *Pap's III*, 812 A.2d at 609-10 (emphasis added).

Elaborating on this lack of guidance, the Pennsylvania Supreme Court held:

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dance establishment. *Hendricks* is not dispositive of this issue for three cogent reasons. First, it was decided before *Pap's II* and utilized the now-abandoned *Barnes* standard. Second, its makes no adjudication under the State Constitution, and contains no analysis, let alone even argument, of whether the protections under Ky. Const. § 8 are anything different than what are provided by the First Amendment. Third, and most importantly, *Hendricks* pre-dates, almost by a decade, the Pennsylvania Supreme Court decision in *Pap's III*, which has particular persuasive authority as referenced above because of the use of the Pennsylvania Constitution as the basis for the Constitution of the Commonwealth of Kentucky. For basically these same reasons, *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. Ct. App. 2001), is similarly inapplicable. In addition, the ruling in *Jameson* reserved the state constitutional issue squarely facing this Court in this appeal because Mr. Jameson had not properly preserved that issue for appellate review. *Jameson*, 215 S.W.3d 9, 13, 14 (Ky. 2006).

[20] The lower courts never confronted this evidentiary dilemma or even the application of Pennsylvania precedent in this regard. Rather, they simply adopted the *O'Brien* standard as justification to uphold the provisions, impliedly concluding that whatever standard applied, it had been met. Apx. A, pp. 30-31.

> "Although this Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, §7, doing so here is no easy matter, even if we were obliged or inclined to. The position of the decisive Supreme Court concurrence by Justice Scalia – a position rejected by seven other Justices on the High Court – that this ordinance does not raise a question of protected expression at all finds no support in our jurisprudence. Nor does the concurrence offer any illumination on the proper application of the O'Brien standard, since the concurrence would have sustained the ordinance on grounds that it did not implicate protected expression at all. Meanwhile, the five Justices who agreed that O'Brien should apply ***disagreed upon the application of that intermediate scrutiny test***."

Pap's III, 812 A.2d at 611 (emphasis added). In light of this dilemma, this Court should heed the words of the High Court of Pennsylvania:

> "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."

Pap's III, 812 A.2d at 611. ***Citizens of Kentucky are entitled to no less.***

This Court should follow this additional "uniquely persuasive authority," and for the same reasons articulated by the Pennsylvania Supreme Court that

the ordinance at issue in *Pap's III* failed muster under strict scrutiny (812 A.2d at 612-13), similarly conclude that Chapter 111 is constitutionally infirm pursuant to Ky. Const. §§ 1, 2, 8 and 26, and that the lower courts thus erred.

F. THE HOURS OF OPERATION AND "NO DIRECT PAYMENT" PROVISIONS ARE CONSTITUTIONALLY INVALID.

As amended, § 111.18 now precludes an adult entertainment establishment from remaining open for business "between the hours of 1:00 a.m. and 9:00 a.m. on any day." Accordingly, defined establishments (and, again, even those providing no true "adult" entertainment, such as cabarets where entertainers have to wear at least pasties and G-strings at all times) must remain closed and must refrain from engaging in constitutionally protected expressive activities for ***eight hours of each day***. That is ***one-third of each day; one-third of each week; and one-third of each year***.

PT's is open for business from 11:00 a.m. to 4:00 a.m. Monday through Friday, 4:00 p.m. to 4:00 a.m. on Saturday, and 6:00 p.m. to 2:00 a.m. on Sunday. Affidavit of Brian Franson ("Franson Aff.") ¶ 16; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K. Mr. Franson, the Area Director of *PT's*, estimates that complying with the hours of operation restrictions as set forth in § 111.18 would result in an approximate reduction of twenty-two percent in the number of customers patronizing *PT's*; a thirty percent reduction in the number of dancers performing at the club; a thirty percent reduction in the number of dances performed;

and a thirty-two percent reduction in the revenue generated by the establishment. Id. at ¶ 19.

Blue Movies operates, and has operated in the past, twenty-four hours a day, seven days a week. Affidavit of Robert Hollis, ¶'s 4-6; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. L. For a "24/7" establishment such as *Blue Movies*, the restrictions represent a *33.3% reduction* in the number of hours that it can operate. Per Mr. Hollis complying with the hours of operation provision would result in a 30% reduction in the number of customers; the amount of expressive materials presented; and business revenues. Id. at ¶ 10.

The circuit court upheld the hours of operation provision predicated upon the conclusion in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). R. Vol. VII, pp. 942-62, Apx. C, p. 18. The Court of Appeals affirmed. Apx. A, pp. 36-38. These rulings were erroneous.

First, *Center for Fair Public Policy* utilizes (or at least attempts to utilize) the *O'Brien* standard of intermediate scrutiny which is simply not applicable under the Kentucky Constitution. Indeed, the lower courts never explained why they had failed to undertake any independent analysis under the Constitution of the Commonwealth of Kentucky. Second, in light of the fractured nature of *Barnes*, *Pap's II*, and *Alameda Books*, it is not even clear how those *O'Brien* standards are supposed to be applied. Neither lower court engaged in any discussion of the disputes in federal courts concerning the application of the *O'Brien* elements, and in particular the "narrow tailoring" component thereof.

Because *Alameda Books* is in fact a plurality ruling, the lower federal courts have struggled to utilize the *Marks* standards in order to determine the constitutional "holding" of that decision. Most courts, including the Court of Appeals (Apx. A, p. 26 n.9) have concluded that the holding is represented by the concurring opinion of Justice Kennedy.[21] Reference to his opinion is, therefore, necessary.

Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they cannot have the consequent effect of also reducing either speech or expression related activities, and must "*leave the quantity and accessibility of the speech substantially undiminished.*" *Alameda*, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). As he succinctly stated, "*a city may not regulate the secondary effects of speech by suppressing the speech itself.*" *Id.* (emphasis added).

Justice Kennedy also observes that a regulation can be consistent with the First Amendment "if it is ***likely*** to cause a ***significant decrease*** in secondary effects and a ***trivial decrease*** in the quantity of speech." *Id.*

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[21] *See, e.g., 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008). *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir. 2003) (regarding ordinance prohibiting the sale, use or consumption of alcohol such as is the case here – *see* Section I(G), *infra*); *SOB, Inc., v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (public indecency ordinance); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (zoning and public nudity ordinances); and *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003) (alcohol prohibition and to a dancer/patron "buffer zone").

at 445 (Kennedy, J., concurring) (emphasis added). He summed up his analysis as follows:

> [A] city ***must advance some basis to show*** that its regulation has the ***purpose and effect of suppressing secondary effects***, while leaving the ***quantity*** and ***accessibility*** of ***speech substantially intact***. The ordinance may identify the speech based on content, but only as a short hand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects *by reducing speech in the same proportion*.

Id. at 449–50 (Kennedy, J., concurring) (emphasis added). Equally as important, he further stated that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

Irrespective, the one court that seems to marginalize Justice Kennedy's concurring opinion is indeed the Ninth Circuit decision in *Center for Fair Public Policy*; the ruling relied upon by the lower courts. That opinion, however, is a mere two-two-one decision, and even under federal jurisprudence seems to be at odds with the general doctrine of narrow tailoring under intermediate scrutiny.

First, as noted by the dissent in *Center for Fair Public Policy*, if, as all of the other circuits agree, Justice Kennedy's concurring opinion is in fact the holding of *Alameda Books*, an hours of operation provision is the ***quintessential*** violation of those concerns. *See* 336 F.3d at 1172 (Canby, J., dissenting). Second, Justice Kennedy's opinion does no more than

operationalize the fourth prong of *O'Brien*, which requires that the "incidental" restriction on First Amendment freedoms be "no greater than is ***essential***" to the furtherance of the governmental interest. 391 U.S. at 377. The word "incidental" is generally defined to have two separate components; the effect must be both "***indirect***," and "***minimal***." If the impact is not "indirect," or, more importantly, if it is not "minimal," the regulation fails muster for not being sufficiently narrowly tailored. This is all that Justice Kennedy advocates. Given the affidavits of Franson and Hollis, as acknowledged in the circuit court's ruling (Apx. C, p. 17), the effect upon expression is neither ***minimal*** nor ***indirect***, and the challenges to these provisions should not have been summarily dismissed.

Third, economic impact is certainly one of the effects that a court must look at when determining the constitutionality of a law that impacts upon First Amendment rights (and, accordingly, state constitutional rights as well). And, for the same reason, the "no payment" provision contained in § 111.35(C) is similarly infirm, and the lower courts were in error in holding otherwise. As the Supreme Court stated in *Buckley v. Valeo*, 424 U.S. 1, 65 n.76 (1976), "money" is "a necessary and integral part of many, perhaps most, forms of communication." Succinctly put, "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected

materials." *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979).[22]

Just as government may not simply ban expression it dislikes, it cannot use financial disincentives and

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[22] *See also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "[b]y denying respondents that incentive, the honoraria ban induces them to curtail their expression," and therefore "unquestionably imposes a significant burden on expressive activity"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 208 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable T.V. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity," that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs, that this could result in individuals being unable to see such films, and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression"); and *Simon & Schuster, Inc.*, 502 U.S. at 116 (invalidated a law that took the profits of books by convicted criminals by noting that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

economic hardship to drive disfavored expression into oblivion.[23]

Fourth, even the plurality opinion authored in *Pap's II* notes that a significant constitutional infringement would raise the level of scrutiny and shift the presumption to be against constitutional validity. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." 529 U.S. at 294. The intrusions here are not *de minimis*.

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[23] In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) the court upheld less restrictive rules because it had "no reason to believe that this is a significant impairment of [the Plaintiffs'] business." This is not the case here. The preambles to the Ordinance, in a conclusory fashion, observe that the hours of operation restrictions will have community benefits "without significantly interfering with the availability of adult entertainment." § 111.02(H). Certainly, this evidence establishes that the preamble is incorrect. And, if the preamble is the constitutional justification for this provision, the fact that it is found to be untruthful establishes the infirmity of this Ordinance section. In any event, there were certainly issues of fact in regard to this issue that should have precluded the entry of summary judgment against the Plaintiffs. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 809 (2000) (struck down law restricting the ability to broadcast at certain hours because there was a "significant restriction of communication, with a corresponding reduction in Playboy's revenues."); and *Playboy Entertainment Group. Inc. v. United States*, 30 F.Supp.2d 702, 711 (D. Del. 1998) (a mere 15% decline in revenues, it further observed that this impact served as a "quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers").

Fifth, the fact that the fractured decision in Alameda Books has modified the secondary effects doctrine as first articulated by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is demonstrated no better than by a decision from the very federal district court which is continuing the *Alameda Books* saga following remand from the Supreme Court. In *Alameda Books, Inc. v. City of Los Angeles*, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) (Apx. M), the district court there found that "while the *Renton* standard is still the controlling standard in this case, that standard was ***modified*** by the Supreme Court's holding in *Alameda Books*. Specifically, the court agrees with the plaintiffs that the proportionality requirement [as set forth in Justice Kennedy's concurring opinion] adds a new element to the *Renton* inquiry. . . ." Apx. M, at 19 (emphasis and clarification added).

That inquiry includes an examination of whether the regulating body advances "some basis to show that its regulation has the purpose and effect of suppressing secondary effects, ***while leaving the quantity and accessibility of speech substantially intact***." Apx. M at 21 (emphasis added). *See also* Apx. M at 22-24. The court notes that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately."[24] Apx. M at 26. Yet, that is ***exactly***

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[24] If this Court does, indeed, seek to "borrow" the convoluted federal jurisprudence of intermediate scrutiny related to sexual expression, this Court must also decide, in addition to the narrow tailoring issue, the evidentiary standards that must be applied in order to satisfy the justification for such regulations. In that event, Plaintiffs contend that this Court should adopt the partial

the purpose and effect of the hours of operation restrictions here. *See also* Apx. M at 30.

Here, Plaintiffs submitted ***uncontroverted*** evidence that Metro's approach to reducing secondary effects "will do so by substantially diminishing speech." At the very least, there were material issues of fact which precluded the entry of summary judgment on this issue. For these reasons, the decision upholding the hours of operation provision should be reversed.

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL.

1. METRO LACKS CONSTITUTIONAL AUTHORITY TO UNILATERALLY IMPOSE NEW AND ABSOLUTE PROHIBITIONS ON ALCOHOL WITHOUT VOTER APPROVAL.

Section 111.30 of Metro's Ordinance, entitled "Sale of Alcoholic Beverages Prohibited," imposes a local legislative prohibition on alcohol in adult entertainment facilities. This prohibition is unconstitutional because it was enacted without voter approval, as required under § 61 of the Kentucky Constitution, and the State has not otherwise delegated to Metro any

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concurrence and partial dissent of Justice Souter in *Pap's II* (529 U.S. at 310-17), and his dissent, joined in by Justices Stevens, Ginsburg and Breyer, in *Alameda Books* (535 U.S. at 453-66), for the reasons stated therein. This issue was not, however, resolved by the circuit court. The Court of Appeals did address this issue (Apx. A, pp. 73-78), but Plaintiffs will discuss the erroneous nature of that Court's holding below.

constitutional authority under the Twenty-First Amendment of the United States Constitution to legislatively impose liquor prohibitions.[25]

The Twenty-First Amendment to the United States Constitution is the source for the States' police power over the use and distribution of alcoholic beverages. This Amendment provides in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Generally, this provision allows each state, as a distinct unit of government, to determine liquor regulations within its jurisdiction. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (providing a history).

This Amendment, however, does not directly grant authority to local governments to regulate or otherwise control intoxicating beverages. Instead, states may choose to delegate all, part, or none of this power to local authorities. In Kentucky, the General Assembly has chosen to delegate a portion of its alcohol prohibition authority to local ***voters*** who have the power to prohibit the sale of alcohol within their own territories.[26] *See Early v. Rains*, 28 Ky.L.Rptr. 415, 89

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[25] This issue is presented here pursuant to this Court's order granting discretionary review, wherein the Court expressed an interest in reviewing "any Twenty First Amendment issues raised by the prohibition on alcohol." (Apx. B, Order Granting Discretionary Review).

[26] Section 61 of the Kentucky Constitution provides :The General Assembly shall, by general law, provide a means whereby the

S.W. 289 (1905) (history of § 61). Under this constitutional provision, "[t]he citizens who are legal voters in the territory ***alone*** can take the initiative in [alcohol prohibition] matter[s] . . . [and] it is not permitted to the Legislature to deny a town or city the right to vote on this subject ***as a whole***." *Id.* at 289 (emphasis added).

To effectuate § 61, the General Assembly enacted statutory procedures for conducting local elections regarding the prohibition of alcohol. *See* Ky.Rev.Stat. §§ 242.010- 242.990 (1998 and Supp.2007). Under these provisions, voters within Kentucky territories, rather than local governments or the Commonwealth, determine whether and where alcohol may be sold.

In enacting § 111.30, Metro ignored the constitutional and statutory requirements for alcohol prohibition in Kentucky and usurped the Commonwealth's authority under the Twenty-First Amendment, which has been delegated to local voters. This violates Constitution § 61 and the corresponding voting procedures found in KRS §§ 242.010- 242.990. It also violates KRS § 82.082, which bars Metro from exercising "any power . . . in conflict with a constitutional provision or statute."

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sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All such elections may be held on a day other than the regular election days.

The constitutional restriction on local governments enacting liquor prohibitions in Kentucky was recognized in *Iacobucci v. City of Newport, Kentucky*, 785 F.2d 1354 (6th Cir.1986), *rev'd*, 479 U.S. 92 (1986). In that case, the United States Court of Appeals for the Sixth Circuit held that an ordinance enacted by the city council of Newport, Kentucky, which prohibited nude or nearly nude dancing in establishments selling liquor, was an unconstitutional exercise of police powers outside the realm of the Twenty-First Amendment. In rejecting the city ordinance, the court acknowledged that the Commonwealth of Kentucky's power to ban the sale of alcoholic beverages entirely under the Twenty-First Amendment "included the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 1358 (citations omitted). The court, however, questioned whether the Commonwealth had delegated this power to local legislative authorities:

> Given the express statutory authorization for cities to conduct popular elections on the question of local prohibition, see K.R.S. §§ 242.010-242.990, as required by the Kentucky Constitution, it is very doubtful that a city in Kentucky may by ordinance "ban the sale of alcoholic beverages entirely." . . . A local government cannot exercise in part a power it does not hold in full, and the citizens of Louisville/Jefferson County have not chosen to exercise the power granted to them by K.R.S. §§ 242.010- 242.990 and § 61 of the Kentucky Constitution.

Id. at 1358.

The Supreme Court reversed the Sixth Circuit's decision insofar as the appellate court fail to consider and apply *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). But the Court "expressed no opinion" on the "state-law question" of whether the Commonwealth had delegated to local legislatures the authority to enact prohibitions on alcohol. *Iacobucci*, 479 U.S. at 96 n.6 (1986).[27]

In an apparent effort to avoid the Twenty-First Amendment delegation-defect identified in *Iacobucci*, Metro has claimed that § 111.30 is not a liquor regulation, but merely a regulation of adult entertainment facilities. Metro Court of Appeals Br., p. 39. With all due respect, this is a distinction without a difference. Regardless of the ***form*** that Metro uses to classify and describe § 111.30, Metro, ***in substance***, has imposed a prohibition on the sale of alcohol without voter approval. And as a result, it has violated the Kentucky Constitution.

Local governments in Kentucky share some concurrent responsibilities with the Commonwealth for the regulation of alcohol.[28] But the fact of the

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[27] The precedential value of the Supreme Court's approval of the ordinance in *Iacobucci* has been called into question following the Court's subsequent ruling in *44 Liquormart*. *See Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 1002 n.6 (11th Cir. 1998). But regardless of the *44 Liquormart* decision, the Twenty-First Amendment delegation concerns identified by the Supreme Court and the Sixth Circuit in *Iacobucci* still exist.

[28] For example, KRS 241.160 requires cities wherein alcoholic beverages are sold to appoint a local administrator. And under KRS 241.190, the local administrator has the same duties and responsibilities regarding local licenses as the State Board has to

matter is, local governments do not share concurrent power with the ***voters*** to approve local prohibitions on alcohol. Under § 61 of the Constitution, this power has been delegated only to local electorates. Thus, while Metro can ***regulate*** alcohol, in some capacities, concurrently and consistently with state authorities, it may not impose an outright ***prohibition*** on the sale of alcohol without voter approval. This is precisely what Metro has done.

2. EVEN ASSUMING METRO HAS AUTHORITY TO PROHIBIT ALCOHOL WITHOUT VOTER APPROVAL, SECTION 111.30 IS PREEMPTED BY STATE LEGISLATION.

Section 111.30 prohibits those establishments which hold adult entertainment business licenses from also obtaining liquor licenses. This provision of the Ordinance is preempted by state statute. "[T]he power of the state to regulate the alcoholic beverage industry is supreme. Any delegation of that authority, because of the nature of the industry, must be specific and unequivocal, not merely inferential." *Whitehead v. Estate of Bravard*, 719 S.W. 2d 720, 724 (Ky. 1986). Thus, any local regulation of that industry must be specifically authorized by the General Assembly or the Alcoholic Beverage Control Board. *Id.* In *City of Ashland v. Kentucky Alcoholic Beverage Control Bd.*, 982 S.W. 2d 210, 213 (Ky. Ct. App. 1998), the court held that absent express or specific authority to disqualify certain retailers from holding an alcoholic

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state licenses. Moreover, KRS 243.070 gives local authorities the power to impose license fees upon the sale of alcohol.

beverage license, such a restriction was invalid, and stated:

> However, there is no express or specific authority to create a scheme that disqualifies certain types of retailers such as grocery stores or gasoline stations from obtaining a package license to sell alcoholic beverages. We agree with the lower court that any conflict between the City's ordinance and a specific statute must be resolved in favor of the statute. *See Commonwealth v. Do, Inc., Ky.*, 674 S.W.2d 519 (1984).

Recently, in *Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't,* 127 S.W.3d 647 (Ky. 2004), this Court again reaffirmed that where a local ordinance is in conflict with state statues, it may not be enforced:

> Accordingly, the Metro Government's ordinance is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute cited above. Therefore, in absence of a particular grant of authority to regulate non-licensees by the imposition of civil fines in KRS 241 et seq., the Metro Government is without authority to apply the penalties set forth in the Ordinance to non-licensees. See *Boyle v. Campbell, Ky.*, 450 S.W.2d 265, 268 (1970) (invalidating a city ordinance dealing with Sunday Closing laws, and holding that "if the doctrines of 'preemption' and 'conflict' are not dispositive . . . there is a basic concept which invalidates this ordinance. . . . that the City of Bowling Green simply lacks the authority by

> local law to amend, modify, interpret or construe at [sic] state statute").

Id. at 649 (clarification in original).

There is no state statute that prohibits a business engaged in "adult entertainment" from applying for and receiving a liquor license. As stated, a number of the Plaintiffs possess just such a license. This provision is therefore statutorily preempted in regard to them.

3. SECTION 111.30 IMPOSES AN UNCONSTITUTIONAL CONDITION ON THE ISSUANCE OF A LICENSE.

The government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights, as the Sixth Circuit made clear in *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1077 (6th Cir. 1994). The Ordinance flatly contradicts the well-established precedent that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression. *Id.*[29] Nevertheless, § 111.44 requires

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[29] *See also Perry v. Sinderman*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests –

that the liquor-licensed Plaintiffs, as a condition of obtaining their adult business licenses, give up their liquor licenses. Those Plaintiffs have made significant investments in time, money and energy in establishing their businesses, and each of their licenses are valuable. Metro may not condition the maintenance of the Plaintiffs' liquor licenses upon their willingness to give up their right to engage in constitutionally protected expression. As such, the imposition of such a condition as a requirement to obtain or maintain a liquor license is blatantly unconstitutional and is preempted by state law.

H. THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS ARE INFIRM UNDER THE KENTUCKY CONSTITUTION.

Chapter 111 creates an entertainment "buffer zone" by providing that it is a violation for any employee to appear "semi-nude" (*i.e.*, while ***clothed***) unless he or she is located ". . .at least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor." § 111.35(B). The lower courts erred in upholding the constitutionality of such provisions as they violate the Kentucky Constitution for a variety of reasons.

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especially his interest in freedom of speech"); *Keyshian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege")); and *44 Liquormart*, 517 U.S. at 513(" . . .it does not follow that conferral of [a governmental] benefit may be conditioned on the surrender of a constitutional right") (clarification added).

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION.

That the six-foot buffer zone does not pass scrutiny under the Kentucky Constitution is ***directly*** demonstrated by the Oregon Supreme Court's recent consideration of the constitutionality of a similar (but two foot ***smaller***) buffer zone under Art I,§ 8 of the Oregon Constitution[30] in *City of Nyssa v. Dufloth,* 121 P.3d 639 (Or. 2005). There, the ordinance in question required every entertainer to be clothed unless "removed at least four feet from the nearest patron." *Id.* at 640. In its decision, the Oregon Supreme Court relied on its analysis in the related case of *Oregon v. Ciancanelli*, 121 P.3d 639 (Or. 2005) decided the same day. That decision found that a statute prohibiting "live public shows" in which participants engaged in "sexual conduct" was aimed directly toward the expressive aspect of the conduct that the law described, and therefore was a regulation restraining free expression. *Id.* at 634.

Applying that construct, the court in *Nyssa* found that a four foot buffer zone was also specifically directed by its terms at restraining free expression since the ordinance applied only to performances in establishments that regularly featured nude entertainment. *Nyssa*, 121 P.3d at 643-35:

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[30] Article I, § 8 of the Oregon Constitution is similar to the corollary provisions of the Kentucky Constitution, and provides that: "No law shall be passed restraining the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

> . . . Article I, section 8, precludes the Legislature from using limitations on speech or expression as a substitute for regulating that conduct directly. . . . In the present case, the city constitutionally can regulate such conduct as sexually contact between performers and patrons, and the fact that an individual uses speech or expression in the course of that conduct would not immunize the individual from prosecution. However, that is not what the ordinance at issue here does. The four-foot ordinance does not specifically preclude or even refer to sexual contact between performers and patrons. Rather, as discussed, it simply restrains certain kinds of expression in certain kinds of establishments.

Id. at 643 n.5 (citations omitted). Accordingly, the buffer zone ordinance was found unconstitutional on its face as a restraint upon free expression. *Id.* at 643-644.

The six foot buffer zone here is similarly directed solely at the expressive aspect of live entertainment, and is therefore a direct restraint on expression protected by the Kentucky Constitution. As noted in *Nyssa*, these types of buffer zones are aimed directly at a particular type of expression as they only apply to "one disfavored type of communication (nude performances) in one disfavored type of establishment (one that regularly features that type of entertainment)."[31] *Id.* at 643 (clarifications in original).

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[31] It is important to note that the buffer zone in *Nyssa* applied in regard to ***nude*** entertainers. As stated herein on numerous

Chapter 111 also restrains free expression and should therefore have been declared unconstitutional.

2. THE BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION.

Section 1 of the Kentucky Constitution protects the freedom of association. The corollary rights protected under the First Amendment are described in *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), where the Court stated that it "has recognized a ***right to associate*** for the purpose of *engaging in those activities protected by the First Amendment*." (Emphasis added). Here, of course, Plaintiffs are engaged in "First Amendment" speech-related activities. And, the Sixth Circuit has agreed that exotic dance performers and patrons desiring to view such entertainment are indeed imbued with freedom of association protections under the First Amendment. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson* County, 274 F.3d 377, 396-97 (6th Cir. 2001).

Most importantly, freedom of association rights are not analyzed under an intermediate level of scrutiny. Rather, infringements on such liberties must pass muster under strict scrutiny in order to be upheld. "Infringements on that right may be justified by regulations adopted to serve ***compelling*** state interests, unrelated to the suppression of ideas, that

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occasions, neither nude nor even "topless" entertainment is permitted under the provisions of Chapter 111.

cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (emphasis added). *Accord Deja Vu of Nashville*, 274 F.3d at 396. Consequently, the freedom of association rights under the Kentucky Constitution must be evaluated pursuant to strict scrutiny as well.

The lower courts improperly rejected Plaintiffs' freedom of association argument in regard to the buffer zone provisions by in fact relying upon *Deja Vu of Nashville*. R. Vol. VII, pp. 942-62; Apx. C, p. 16; Apx. A, pp. 46-47. What those courts failed to recognize was that the Sixth Circuit ***agreed*** that exotic dance entertainers and their patrons (even while nude - - which is certainly not the circumstance here) receive freedom of association rights under the First Amendment, and that a ***three foot*** buffer zone was narrowly tailored because "it went no further than necessary. . . ." *Id.* at 396-97. *See also Kentucky Restaurant Concepts*, 209 F.Supp.2d at 680-82 (a ***three foot*** buffer zone contained in the now-superceded Louisville Code of Ordinances went "no further" than necessary and was therefore sufficiently narrowly tailored).[32]

Consequently, given the fact that Metro has enacted a buffer zone *twice as large* as the Sixth Circuit and the federal district court in Louisville have held necessary to effectuate the purported governmental interests, it goes without saying that

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[32] In addition, both of these cases were decided before the Supreme Court decision in *Alameda Books*, which significantly undercuts any contention that the government can enact such entertainment buffer zones.

such a requirement cannot pass muster under the narrow tailoring component of either *intermediate or strict scrutiny*. The governmental concerns noted by the Sixth Circuit in *Deja Vu of Nashville* are simply irrelevant here, for those entertainers could dance ***fully nude***. Here, Chapter 111 ***specifically precludes*** such dance entertainment.

3. THE BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY.

Assuming, *arguendo*, that the constitutionality of the entertainment buffer zone under Ky. Const. § 8 is to be evaluated pursuant to federal intermediate scrutiny (whatever that may be), the first thing for this Court to determine is whether Metro had the power to enact this regulation in the first place. *O'Brien*, 391 U.S. at 377. It did not.

The preambles to Chapter 111 do not articulate a specific reason for adoption of these restrictions. Accordingly, it is somewhat difficult to discern the supposed governmental interest underlying their enactment. It is safe to conclude that the supposed purpose was to reduce the chance of illegal activity occurring between dancers and customers; *i.e.*, some type of illegal or impermissible touching between the two. There is nothing inherently illegal about an entertainer, while wearing pasties and a G-string, from dancing five feet eleven inches away from a customer, or performing on a stage that is only seventeen (as opposed to eighteen) inches "from the floor." § 111.35(B).

Consequently, the ability of Metro to enact this "buffer zone" is governed by the dictates of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 253 (2002), where the it concluded that the government may not prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" Metro simply does not then have the authority to preclude a form of close but ***clothed*** dancing not consisting of some form of illegal contact. The remedies available to government are to punish violations of the law; not to abridge the rights of free speech. *Free Speech Coalition*, 535 U.S. at 245. *See also Commonwealth v. Ashcraft*, 691 S.W.2d 229, 232 (Ky. Ct. App. 1985) (regulation is overbroad when "in an effort to control impermissible conduct, the [ordinance] also prohibits conduct which is constitutionally permissible" (clarification added)). Metro may prohibit impermissible sexual touching, but it may not criminalize ***clothed*** dancing in close proximity to viewers. While the former may be narrowly tailored, the latter is not.

But the foremost reason that this "buffer zone" is not narrowly tailored is because of its impact upon protected expression. In Subsection I(F), Plaintiffs discussed the fact that imposing a significant impact upon expressive activities is a constitutional deprivation. Part of that argument revolves around Justice Kennedy's critical concurrence in *Alameda Books*. There, he provides an example of when his "proportionality" standard has been violated. If a law has a minimal *two percent impact upon speech and expression-related activities,* it will not be found to be constitutionally wanting. 535 U.S. at 451-53. He

describes the constitutionally allowable impact as being limited to that which is "trivial." *Id.* at 445.

The law in the Sixth Circuit in regard to this issue pre-*Alameda Books* is found in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 41s3 (6th Cir. 1997), where the appellate court concluded that the effect of a dancer buffer zone must be examined in order to determine whether it "intended to destroy the market for adult cabarets . . . ." The court there noted that the plaintiffs had failed to present any evidence substantiating any harm associated with the buffer zone at issue there. *Id.* In the lower courts here, however, Plaintiffs presented detailed evidence substantiating just such drastic consequences.

The Affidavit of Franson (Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K) attached as Exhibit 2 thereto a diagram of the *PT's* club, and demonstrates the effect that the buffer zone would have on that establishment. The areas in green are where entertainers perform, and the red hatching are all of the areas of the club where -- if entertainers were performing in the green areas -- customers could ***not*** be located pursuant to the requirements of the six foot buffer zone. Id. at ¶'s 7-10.

A simple review by this Court of Ex. 2 to Mr. Franson's affidavit illustrates that the dissemination of this form of ***clothed*** expression will be ***significantly*** reduced -- if not completely obliterated - - if § 111.35(B) can be enforced. Either, there is little-to-no space left in the club for customers to locate when entertainers are utilizing the stage areas, or if customers are using all of the floor space currently available to them, there is ***no*** space left ***anywhere*** in the club for entertainers to perform. Id. ¶'s 12 and 13.

A federal court has addressed these types of concerns in regard to a ten foot buffer zone in the case of *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046 (N.D. Ohio 1999), and found this type of evidence sufficient to justify an injunction against such a buffer zone.[33] The same type of evidence certainly precluded the entry of summary judgment against the Plaintiffs on this issue.

I. THE RESTRICTIONS ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD.

For the reasons set forth above, the challenged provisions of Chapter 111 are subject to strict scrutiny. Either, they are subject to that level of review in-and-of-themselves, or because they do not satisfy the *O'Brien* standards, they must be subject to strict constitutional scrutiny. The restrictions as contained in Chapter 111, however, do not pass muster under that heightened standard because they are certainly not the "least restrictive means" available which would be necessary in order to further a compelling governmental interest. Even if "adverse secondary

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[33] The district court in *J.L. Spoons* also observed that the two foot stage height requirement rendered the buffer zone duplicative and therefore most likely unconstitutional. *Id.* at 49 F.Supp.2d at 1045-46 (". . . if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease"). Given the fact that § 111.36(B) contains a similar (albeit eighteen inch) stage height requirement, the buffer zone fails the narrow tailoring component of *O'Brien* for this additional reason.

effects" could be used as a basis to justify such regulations, there are certainly a myriad of less restrictive means available which would not so adversely impact upon the engagement of speech and expression-related activities. Zoning laws and prohibitions against sexual conduct and contact are only a few such examples. Because Chapter 111, however, has such a drastic impact upon protected expression, it does not satisfy the requisites of strict scrutiny which the Kentucky Constitution requires.

II. THE LOWER COURTS ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES.

Plaintiffs challenged a number of terms contained in Chapter 111, including the critical definitions therein, as being impermissibly vague. Brief, March 5, 2004; Apx. T, pp. 41-46. Yet, the circuit court concluded that Plaintiffs lacked standing to challenge the definitions under § 111.02 as to what would constitute an "adult entertainment establishment because Plaintiffs ***admittedly*** qualify as such establishments." R. Vol. VII, pp. 942-62; Apx. C, p. 13. The Court of Appeals affirmed for the same reason. Apx. A, pp. 57-58. Respectfully, Plaintiffs never "admitted" any such thing.

In fact, Plaintiffs' complaint asserts only that "*Defendant* contends that Plaintiffs are subject to the regulatory provisions of the Ordinance. . . ." Complaint, ¶ 17; R. Vol. I, pp. 1-44. *See also* Complaint, ¶ 24 (same allegation). Paragraph 21 of the complaint further asserts that two entertainers, despite wearing clothing covering more than required

in the Ordinance, received citations for violating Chapter 111 and "are now subject to criminal penalties." The paragraph also states that this action "was taken despite Metro's representations to Division 6 [the circuit court] that the regulatory provisions would ***not*** apply to entertainers dressed in such a fashion." (Emphasis and clarification added). Accordingly, Plaintiffs have not "admitted" that they "qualify" as such establishments, and because the definitions of the Ordinance are so central to the enforceability of its provisions, the appellate court's ruling should not stand until these issues are addressed and resolved.

The circuit court also concluded that Plaintiffs lacked standing to challenge the prohibition of minors as set forth in § 111.17 (Plaintiffs having raised this argument in Apx. U, pp. 18-24), stating that the rights of minors "are not before this Court. . . ." R. Vol. VII, pp. 942-62; Apx. C, p. 9. This conclusion is erroneous for two reasons. First, the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see, e.g.*, § 111.99 and § 111.43), applies to the "***operator***," and ***not*** the minor. *See* § 111.17(a) ("an *operator or employee* of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment") (emphasis added). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting *their own rights* to not be subject to prosecution under an ordinance provision that directly

applies penalties to ***them***. Second, Plaintiffs are clearly entitled to assert standing of their patrons. [34]

Because of these erroneous standing rulings, the circuit court never addressed the ***merits*** of these claims and, consequently, its decision should therefore be reversed. The Court of Appeals affirmed (Apx. A, pp. 58-61), and held that Plaintiffs set forth a different argument before the Court of Appeals than the one submitted to the circuit court. Apx. A, p. 59. Respectfully, the difference was because Plaintiffs were not arguing their standing to raise this issue before the circuit court; they were discussing the issue of preclusion of minors from the business. The circuit court raised the standing issue in its decision, and Plaintiffs therefore addressed with the Court of Appeals the minor restrictions in response to that aspect of the circuit court's decision, demonstrating why Plaintiffs had standing. Further, Plaintiffs' argument was misconstrued by the Court of Appeals. Apx. A, pp. 60-61. ***If*** the nudity provisions were found to be constitutional, ***then*** the businesses would cease to be true "adult" establishments. *See* Apx. U, p. 19. Therefore, Plaintiffs' patrons could then include

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[34] *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 289 n.6 (6th Cir. 1998) (adult entertainment magazine had standing to assert rights of its advertisers and readers); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (adult cabaret has standing to assert the rights of entertainers who perform there); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (seller of beer had standing to argue that statute violated customers' equal protection rights); and *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682-84 (1977) (seller of contraceptives had standing to assert customers' substantive due process rights).

minors. The Court of Appeals holding on this issue should also be reversed.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS, AND THE COURT OF APPEALS ERRED IN AFFIRMING.

Plaintiffs raised the following arguments in their briefings which the circuit court simply failed to address in its ruling; each of which was sufficient to warrant the denial of summary judgment in favor of the Defendant. The Court of Appeals erred in finding that each of these claims were either sufficiently addressed or were without merit. These include:

- The inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions. Plaintiffs raised this issue in their Brief filed March 5, 2004; Apx. T, pp. 48-52.[35] The circuit court failed to

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[35] Because the circuit court never even addressed these various matters, Plaintiffs will not substantively discuss them in detail here, but rather refer this Court to the sections of the various memoranda in the record where they were extensively commented upon for the detailed arguments as to why these provisions are unconstitutional. Nevertheless, Plaintiffs will in footnote form, provide very brief references to the applicable authorities which support the unconstitutionality of these provisions. On this issue, *see, e.g.*, *G&V Lounge*, 23 F.3d at 1077 (government cannot condition the receipt of a benefit, such as a license, upon the agreement to refrain from exercising one's constitutional rights – here the rights under Ky. Const. § 10 against warrantless searches); and *44 Liquor Mart*, 517 U.S. at 513 (1996) (same).

rule on this issue, even though it noted in its Dec. 14 Order this argument. R. Vol. VII, pp. 942-62; Apx. C, pp. 7-8. *See also* Apx. A, p. 62.

• The no direct "tipping" provision of § 111.35(C) violated the right of liberty and the right of freedom of speech. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 64-69.[36] While the circuit court concluded that this ordinance provision was not vague (R. Vol. VII, pp. 942-62; Apx. C, pp. 16-17), ***Plaintiffs had made no such vagueness challenge***. *See also* Apx. A, p. 63.

• The entertainment "buffer zone" as set forth in § 111.35(B) violated the right of liberty. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 73-75.[37] *See also* Apx. A, pp. 63-64.

• The licensing scheme is unconstitutional because it does not maintain the status quo pending judicial

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[36] In regard to the violation of the entertainers' liberty interest, the most relevant authorities include *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (court referring to the "broad statements" of the substantive reach of liberty under the Due Process Clause, and that liberty "presumes an autonomy of self that includes freedom of thought, belief, [and] expression. . . "); and *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (liberty includes the right "to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation. . .") (clarifications added).

[37] *See* n. 36, *supra*. In addition, the Court in *Lawrence* noted that "[f]reedom extends beyond spatial bounds." 539 U.S. at 562.

determination. Brief, March 5, 2004; Apx. T, pp. 32-34.[38] *See also* Apx. A, p. 64.

• The licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof once in court. Brief, March 5, 2004; Apx. T, pp. 34-38.[39] *See also* Apx. A, pp. 64-65.

• Metro cannot engraft a dancer buffer zone and "no tip" provision, because Chapter 111 already prohibits both full nudity and "topless" entertainment, which has been recognized by the courts as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 24-29[40]. *See also* Apx. A, pp. 65-66.

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[38] *See Deja Vu of Nashville*, 274 F.3d at 400 ("the status quo must be preserved pending a final judicial determination on the merits"); *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994) (cannot regulate an existing business during the licensing process); and *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (for a law which effectuates a prior restraint on expression to pass muster, it must, among other things, provide that any restraint prior to judicial review can be imposed only for a specified brief period of time during which the status quo must be maintained).

[39] *See Freedman* 380 U.S. at 58-60 (the government must bear the burden of going to court to suppress speech and must bear the burden of proof once in court); and *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F.Supp.2d 874, 889-91 (C.D. Ill. 1999) (licensing scheme of adult businesses must contain the *Freedman* requirement that the government initiate judicial review and bear the burden of proof once in court).

[40] *See G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d. 631, 637-38 (7th Cir. 2003) (ordinances prohibiting nude and "topless"

Because the circuit court did not adjudicate any of these critical constitutional issues (despite the Court of Appeals' holding to the contrary), because Plaintiffs' arguments on these matters are well taken, and because each and every one of these claims was sufficient to defeat the entry of summary judgment on behalf of the Defendant, the decision below should be reversed, with instructions for the circuit court to consider and resolve these various claims.

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dancing in an establishment licensed to sell alcoholic beverages, prohibiting nude and topless dancers from having any physical contact with any other person during a performance, and imposing a buffer zone, were constitutional because they did not prohibit nude dancing (unlike Chapter 111), and the entertainment was not effected because "if all dancers choose to wear *de minimis* clothing necessary to cover all 'specified anatomical parts' then neither the physical proximity nor alcohol prohibition requirement are implicated"); *Kentucky Restaurant Concepts*, 209 F.Supp.2d at 682 (same); and *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 413-16 (7th Cir. 2004) (regulation of entertainment establishments which provided ***clothed*** entertainment (such as Chapter 111 now does) was unconstitutional because, in utilizing Justice Kennedy's approach in *Alameda Books*, as a "direct restriction on erotic expression speech fares worse under the Ordinance than it did under the laws at issue in similar cases," with the court further noting that the ordinance did not apply to nude dancing or other forms of nude entertainment, and that the "uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals"). Here this Ordinance precludes nude entertainment but still then regulates clothed expression.

IV. THE CIRCUIT COURT ERRED IN DISMISSING - - AND THE COURT OF APPEALS ERRED IN AFFIRMING - - THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE.

One of the challenges brought by Plaintiffs was that Chapter 111 was "not enacted upon a proper basis, nor supported by competent and material evidence. . . ." Complaint, Ex. D, ¶ 27(u); R. Vol. I, pp. 1-44. As the Supreme Court noted in *Renton*, the enactment of at least zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments (*i.e.*, the causing of neighborhood crime, decreases in property values, and the increasing of urban blight). 475 U.S. at 47. Chapter 111 was certainly enacted upon such purported concerns. *See* Apx. D, § 111.01. Yet, assuming, *arguendo*, that irrespective of the matters discussed in Subsections I(B) and (E) above (that this doctrine cannot be utilized under the Kentucky Constitution to justify the enactment of restrictions like those in Chapter 111), this Court nevertheless decides that "Federal" intermediate scrutiny is the appropriate standard to apply, Plaintiffs certainly have the right to ***challenge*** Metro's assertion that its Ordinance is justified upon a concern of adverse secondary effects. First, the Court observed in *Pap's II*, where it extended – in a plurality fashion – application of the secondary effects doctrine to anti-nudity laws:

> Here, Kandyland [the plaintiff there] has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, *Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings.*

Pap's II, 529 U.S. at 298 (emphasis and clarification added).

Second, in *Alameda Books*, the plurality opinion authored by Justice O'Connor noted that in attempting to justify restrictions on expression, a municipality can't "get away with shoddy data or reasoning," and that its "evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Further, the Court held that:

> If plaintiffs ***fail to cast direct doubt*** on this rationale, *either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings*, the municipality meets the standard set forth in Renton. If plaintiffs ***succeed in casting doubt*** *on a municipality's rationale in either manner*, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (clarification and emphasis added).

While Plaintiffs raised such a challenge as to the evidentiary justification for the enactment of Chapter

111 and the amendments thereto in their complaint, this matter was ***not*** at issue in the three pending motions. Plaintiffs pointed that out to the circuit court. *See* Plaintiffs' Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, at pp. 1-2. Nevertheless, the court granted complete summary judgment to the Defendant and never permitted Plaintiffs to factually litigate their secondary effects challenge. ***More importantly, the circuit court actually "cleansed" the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***

When Metro filed its Composite Reply in Support of its Motions for Summary Judgment and to Dissolve, and in Opposition to the Plaintiffs' Motion for Temporary Injunction, it raised specific arguments in regard to its evidentiary "justification" for enacting Chapter 111, and submitted affidavits in support thereof. Because Metro was then raising new arguments for the first time in its reply, Plaintiffs filed a motion to strike the composite reply. R. Vol. VII, pp. 899-910; Apx. N. Pursuant to that motion, the circuit court initially granted the relief requested, which was the ability of Plaintiffs to complete certain depositions,[41] and to then file a sur-reply brief with necessary counter-affidavits. R. Vol. VI, pp. 897-98; Apx. O.

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[41] The various deposition notices and accompanying expert witness interrogatories are found as Apx. R. No discovery was, however, taken before the circuit court entered summary disposition.

Defendant then filed a motion for clarification. R. Vol. VII, pp. 918-24. The court then entered an Order – ***issued by agreement of the parties*** – stating that the reply was to be stricken, and ordering that Metro was to file a "new Reply ***which eliminates reference to the affidavits filed in the stricken reply***. . . ." R. Vol. VII, pp. 933-34; Apx. P (emphasis added). The court also ordered, again pursuant to the agreement of the parties, that ***Plaintiffs*** would strike "Exhibit C" of their exhibits in support of their Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order. Id.

"Exhibit C," which was stricken, was the affidavit of Plaintiffs' secondary effects expert, Dr. Daniel Linz, with supporting evidentiary materials.[42] Apx. S. Subsequently, Judge Ryan entered an amended order

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[42] In addition, during the pendency of these motions, the Court of Appeals issued its decision in *Jameson v. Commonwealth*, 2004 WL 1752597 (Ky. Ct. App. 2004), *rev'd* 215 S.W.3d 9 (Ky. 2006), which dealt with such an evidentiary challenge. This led to Plaintiffs filing a second supplemental brief for the purpose of demonstrating that full summary judgment could not be justified (even if the court disagreed with every contention raised by the Plaintiffs in the pending motions), because Plaintiffs could submit at trial virtually the same type of evidence which the Court of Appeals in *Jameson* found to have rebutted the supposed "secondary effects" basis for enacting the ordinance there. Attached thereto was trial testimony from a federal district court action in Louisville involving some of these same Plaintiffs, and exhibits that were previously entered in that action establishing a lack of connection between a number of the "cabarets" in town and adverse secondary effects. Testimony was also attached which concerned the lack of disease transmission in these type of establishments. R. Vol. IV, pp. 588-98; Apx. V.

(R. Vol VII, pp. 937-38; Apx. Q) which clarified what was being stricken, and required Metro to file a "new Reply which ***eliminates reference to the secondary effects affidavits filed in the stricken Reply***. . . ." (New language underlined).

The court insured that the evidentiary challenge to the secondary effects basis would not be at issue in the pending motions, yet it then granted virtually complete summary judgment to the Defendant without ever affording the Plaintiffs the opportunity to litigate that claim. Despite the Court of Appeals' interpretation (Apx. A, pp. 66-72), the fact remains that this issue was removed from full consideration.

The Court of Appeals then spent five pages of its opinion discussing this Court's decision in Jameson[43] (Apx. A, 73-78), and evaluated the few references in the lower court to potential secondary effects evidence, concluding that even though the circuit court denied Plaintiffs the ability to even attempt to cast doubt on Metro's supposed evidence, "there was no error by the trial court." Apx. A, p. 78. The Court of Appeals took it upon itself to evaluate what would ultimately be a ***factual*** dispute and found that "we conclude that the stated reasons articulated by Metro were not pretextual as a prior restraint on free expression, but rather an effort, in accord with the well-established law, to curb the secondary effects associated with adult entertainment establishments." Apx. A, p. 78. Yet, the Court of Appeals undertook no discussion of how such a secondary effects assertion justified enactment of the

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[43] It should also be noted that in *Jameson*, this Court did not conduct an analysis under the Kentucky Constitution.

particular restrictions contained in Chapter 111, or whether the Ordinance provisions satisfied the "narrowly tailored" prong of *Alameda Books*, or satisfied Justice Kennedy's "how speech would fare" test. As discussed above, Justice Kennedy stressed that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

The Plaintiffs should have been afforded the opportunity to actually place all of their secondary effects evidence before the circuit court which - - as evidenced even by the Court of Appeals' recitation of the circuit court record - - it is clear they were denied. The circuit court should have not granted full summary judgment on the case until a later date when all discovery had been taken, evidence from both parties had been submitted, and the issue fully litigated. Indeed, this Court has acknowledged that "evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation." *Jameson*, 215 S.W.3d at 32. Obviously, this Court believes that a secondary effects challenge can be mounted and that actual evidence is necessary to resolve that challenge. Plaintiffs simply ask that they be afforded the opportunity to fully develop that evidentiary record and have it fully considered by the circuit court.

If Plaintiffs were to have successfully challenged the secondary effects justification for the enactment of Chapter 111 at trial under *Pap's II* and *Alameda Books*, the entire ordinance would be ***invalid***. *See, e.g.*, *Alameda Books*, 535 U.S. at 439. Given the record originally submitted by the Plaintiffs below, and more

importantly the lower court's subsequent cleansing thereof, it was improper to dismiss Plaintiffs' entire lawsuit without affording them the opportunity to litigate their claim that Metro did not have a sufficient evidentiary basis to enact Chapter 111. The Court of Appeals was further in error in not reversing this decision and in its analysis of the secondary effects jurisprudence as applied to this case.

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER.

For the same reasons that a reversal of the partial grant of summary judgment is warranted, the denial of Plaintiffs' motion for temporary injunction also warrants reversal as an injunction was necessary to prevent any further irreparable harm to Plaintiffs' freedom of expression rights. The Court of Appeals erred in not reversing these decisions. Plaintiffs established the elements required for a temporary injunction pursuant to CR 65.04: (1) Plaintiff showed a probability of irreparable injury; (2) the public interest will be harmed, or the injunction will merely be to maintain the status quo; and, (3) a substantial question was presented. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

Plaintiffs clearly showed a probability of irreparable injury as they were being, and would continue to be, deprived of their right to free expression under the Kentucky Constitution if an injunction was not issued. Any infringement of expressive rights, for even minimal periods of time, constitutes irreparable harm under the federal

constitution, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and nothing is different under the State Constitution. *James*, 63 S.W.3d at 605 ("Restraining free speech constitutes immediate and irreparable harm, if unauthorized"). The public interest would not have been harmed by an injunction as "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc.*, 23 F.3d at 1079. In addition, the injunction would merely have preserved the status quo. Finally, Plaintiffs presented substantial questions on the merits of their challenges, as is demonstrated by the briefing herein.

VI. THE PRINCIPAL OWNER DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

The Court of Appeals erred by overturning the ruling of the circuit court that § 111.36(A), which requires a mere 20% shareholder and corporate directors to undergo the entire licensing process contained in Chapter 111 (*See* §§ 111.36, 111.02, and 111.36 (B)(2)(b)),[44] is unconstitutional. Apx. A, pp. 79-84.

Regulations compelling disclosures in order to be able to engage in constitutionally protected activities violate the First and Fourteenth Amendments and the

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[44] These persons would therefore be required to disclose their name, mailing address, date of birth, and a copy of a government-issued photo identification card or set of fingerprints, § 111.36(B)(2), and to disclose all convictions for "specified criminal activities as defined in this Chapter . . . ." § 111.36(B)(6).

rights of privacy related thereto,[45] as well as the corollary, and more expansive, protections contained in the Kentucky Constitution (Ky. Const §§ 1,2,8,14,and 26). The federal precedent on this issue stands for the proposition that persons are entitled to engage in protected conduct, especially that which is controversial, without the public disclosure of their connection to such activities. There is a fundamental right to anonymously associate for the purpose of engaging in First Amendment activities. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995); and *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity"). *See also* cases set forth in n.45, *supra*. Ownership of, and association with, "First Amendment" protected businesses clearly fall within this zone of privacy.

For example, in *Ellwest*, the court dealt with disclosure requirements for partners and shareholders that were similar to the provisions here. The only significant difference is that here, § 111.36(A) calls for information disclosure of any and all owners having a 20% interest, *regardless of their involvement with the*

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[45] *See, e.g., Buckley*, 424 U.S. at 64; *Talley v. California*, 362 U.S. 60, 64 (1960); *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 461-62 (1958); *Genusa v. City of Peoria*, 619 F.2d 1203, 1215-17 & n.33 (7th Cir. 1980); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995); *TK's Video, Inc. v. Denton County, Tx.*, 24 F.3d 705, 709-10 (5th Cir. 1994); *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 224-26 (9th Cir. 1989); *T-Marc, Inc. v. Pinellas County, Fla.*, 804 F.Supp. 1500, 1505-06 (M.D. Fla. 1992); and *Ellwest*, 718 F.Supp. at1564-70.

operation of the establishment, while the similar provision in *Ellwest* compelled disclosure of shareholders holding five percent or more of the stock of a corporate applicant. *Ellwest*, 718 F.Supp. at 1564. This distinction is without constitutional significance. The District Court in *Ellwest* observed that:

> Persons who solely have ownership interests in adult-oriented establishments, such as limited partners and shareholders, have no responsibility for the day-to-day operations of the business and, therefore, are not charged with operating such establishments in accordance with the ordinance. . . . Other courts have also consistently struck down disclosure provisions relating to stockholders and persons having only a financial interest in a business on the basis that there is insufficient necessity on the part of the government to justify such intrusion into fundamental First Amendment rights.

Id. at 1565.[46]

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[46] *See also Genusa*, 619 F.2d at 1217 (the Seventh Circuit striking down disclosure requirements for individual *officers, directors, and shareholders* as an "unjustified prior restraint and an invasion of privacy"); *Pentco, Inc. v. Moody*, 474 F.Supp. 1001 (S.D. Ohio 1978) (court invalidating similar disclosure provisions for partners and shareholders holding ten percent or more of the stock of a corporate applicant, on the basis that such individuals were not involved in the day-to-day management of the business); *East Brooks Books*, 48 F.3d at 226 (the Sixth Circuit invalidating an ordinance requiring disclosure of all stockholders' names); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (court striking down ***all*** stockholder disclosure requirements); and *Buckley*, 424 U.S. at 64 (Court held that

The Court of Appeals ignored these precedents when holding that the trial court erred in finding that the challenged disclosure of 20% owners was not *de minimus*, without considering "the purpose for which the provisions was enacted," and whether "there exists a substantial relation to the stated governmental interest." (Apx. A, p. 80-81, 84).

The Court of Appeals held that the circuit court did not "make a proper evaluation under *O'Brien's* fourth prong: whether the incidental restriction on alleged free speech or expression is no greater than essential to the furtherance of that interest." Apx. A, p. 80. The circuit court made a proper analysis (Apx. C, pp. 10), holding that requiring a 20% shareholder, who would have little or no responsibility for the day to day operation of a business is greater than essential to the furtherance of Metro's interest. Apx. A, p. 80.

Further, the Court of Appeals goes to great lengths to point to cases in which similar disclosure provisions were invalidated, contending that because the various interests those municipalities sought to further differ from some of Metro's interests, Chapter 111's shareholder disclosure provisions are valid. Apx. A, pp. 80-83. Because one of Metro's purported interests sought to be furthered was to monitor the involvement of organized crime in the adult entertainment industry, the Court of Appeals felt that it was permissible to require more than the *de minimus* disclosures. Apx. A, pp. 83-84. However, one of the

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"compelled disclosure, in itself, can seriously infringe on the privacy of association and belief guaranteed by the First Amendment").

cited cases in that opinion supports the circuit court's invalidation of this provision: "Shareholders are not ultimately responsible for the day-to-day operation of the business and therefore would have no control over the conditions at the adult establishments." Apx. A, p. 82. Further, the Court of Appeals cites to *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), noting that the court there held "that officers and directors, not shareholders, were legally responsible for the management of a corporation's business." Apx. A, p. 82. Regardless of the fact that one of Chapter 111's purported governmental interests is the involvement of "organized crime," the required disclosure of individuals who have no legal responsibility for the management of an adult establishment does not satisfy the fourth prong of *O'Brien*, and the Court of Appeals erred in reversing.

Additionally, the Court of Appeals failed to address the issue that requiring such disclosures ***to the government*** as a condition for engaging in constitutionally protected expression is impermissible. These compelled disclosures further evidence the unconstitutional nature of the criminal disability provisions in that "principal shareholders" can be denied licensing where that individual has absolutely no management, control, or operational oversight of the day-to-day management of the business. This why other courts have invalidated these type of "shareholder" disclosure requirements.

VII. THE "NO-TOUCH" PROVISION OF CHAPTER 111 IS UNCONSTITUTIONAL.

The "no touch" provision in § 111.35(D) is unconstitutional for numerous reasons, as held by the

trial court. First, it must be noted that the "no touch" provision ***does not*** apply merely when the entertainer is "semi-nude," as is the case of the buffer zone and the "no payment" provisions. Basically, if a dancer "regularly" (whatever that may mean) appears "semi-nude in an adult entertainment establishment," she cannot "touch a customer or the clothing of a customer" *irrespective of how she is dressed, or whether or not she is even performing*. She cannot, for example, shake the hand of a customer even though she is fully dressed in a nightgown and sitting in a chair. Such purely innocent conduct can result *in fines, double fines, imprisonment and loss of license to engage in future expressive activities*. §§ 111.43 and 111.99.

This provision is constitutionally impermissible and the trial court agreed "with Plaintiffs that the sweep of subsection (D) is overbroad in that its reach prohibits ***otherwise legal*** and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17 (emphasis added). The Court of Appeals disagreed, finding that "touching between a performer and a customer is not protected expression," and reversed the circuit court on this issue. Apx. A, pp. 86-87. Of course the Court of Appeals cited to not one Kentucky court supporting this holding, and ignores both the freedom of association and liberty rights involved.

A law is overbroad if, in its reach, it prohibits constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Here, the statutory provision at issue certainly criminalizes and proscribes

innocent conduct that is not otherwise illegal; *i.e.*, non-sexual touching.[47]

Before moving past this point, however, one further comment is in order. Plaintiffs are ***not*** seeking a ruling that would permit any type of illicit touching. Metro can certainly proscribe impermissible sexual touching between individuals in an adult establishment, or elsewhere. That is not, however, the approach which Metro decided to take, and instead enacted a draconian provision which prohibits any innocent physical interaction between certain individuals at any time.

Second, and in this regard, the no touch provision *is not limited to conduct occurring within an "adult entertainment establishment."* As long as an entertainer "regularly" appears semi-nude in an adult entertainment establishment, she cannot ***ever*** "touch a customer or the clothing of a customer," according to the plain terms of the Ordinance.[48] Pursuant to the

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[47] The proscriptions as contained in § 111.35(D) should therefore be contrasted with another "no-touch" provision evaluated by a federal district court in *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046-47 (N.D. Ohio 1999), where that court upheld a no touch provision because it had a "scienter element" that allowed "inadvertent and non-sexual contact," and that permitted contact when a dancer had on more than pasties and a g-string. *Id.* at 1046-1047. None of these limitations apply here, thereby rendering these provisions overbroad and unconstitutional as found by the circuit court.

[48] This, again, should be contrasted with the buffer zone and "no payment" provisions, which facially only apply when an entertainer is semi-nude ***and*** in an adult entertainment establishment. §§ 111.35(B) and (C).

canons of statutory construction, the textual difference between this provision and the buffer zone and "no payment" sections (*see* n.51, *supra*) must be considered intentional and of interpretational significance, and should not be ignored by the lower courts or this Court.

Certainly, it is clear that any law which precludes persons from shaking hands at any time and in any place is overbroad for the reasons set forth above. Nevertheless, the Court of Appeals contends that the trial court was obliged to interpret § 111.35(D) by applying a narrower construction that would thus uphold the constitutional validity of the Ordinance by causing it to apply only to dancers within an adult entertainment establishment. Apx. A, pp. 85-86. However, there are numerous reasons why such a contention is misplaced. First, such a limiting construction would not save § 111.35(D) from constitutional invalidation. In fact, the circuit court first found this provision infirm because it "prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17. Consequently, because the Court of Appeals' limiting construction does not address the primary reason why the circuit court found this provision constitutionally infirm, reversal based upon the limiting construction was in error.

Second, as stated above, because this provision is specifically written in a fashion so that it is ***not*** limited to conduct occurring in an adult entertainment establishment - - as acknowledged by the Court of Appeals (Apx. A, p. 85) - - whereas other proscriptions found in the Ordinance contain specific language

limiting the reach of those proscriptions to conduct occurring inside such businesses (the buffer zone and "no payment" provisions), this Court cannot ignore this intentional textual difference. To apply the Court of Appeals' limiting construction, this Court would have to directly ignore ***intentional*** textual differences which the Metropolitan council placed into the Ordinance.

Third, the Court of Appeals failed to take into account that although courts are obliged to give "if possible, an interpretation which upholds [a statute's] constitutional validity," *American Trucking Assoc. v. Commonwealth of Kentucky Transportation Cabinet*, 676 S.W.2d 785, 789 (Ky. 1984), "the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a *casus omissus,* or cure an omission, however just or desirable it might be to supply an omitted provision." *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. Ct. App. 1960) (emphasis in original). In providing a statutory construction, the courts may only "supply clerical or grammatical omissions in obscure phrases or language of a statute in order to give effect to the intention of the Legislature, presumed or ascertainable from the context. . . ." *Id.* The Court of Appeals either overlooked or chose to ignore these restraints upon judicial interpretation, and held that the trial court failed to re-write the Ordinance in order to avoid what the appellate court calls a "hypothetical constitutional clash." Apx. A, p. 86. The trial court, however, acted properly in refusing to act as the legislative branch of Metro Government.

Finally, this provision violates both the Freedom of Association Clause of the Kentucky Constitution, as well as the liberty rights found in the Due Process Clause as discussed in Section III above. The protection of liberty emanates from Ky. Const. §§ 1 and 11. The federal corollary to these provisions is found in the Fourteenth Amendment.[49] *See Lawrence*, 539 U.S. at 565 (Court "confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person").[50] The liberty rights afforded under the Kentucky Constitution are no less. By effectively prohibiting entertainers from even shaking the hand of a patron while fully clothed, Metro has unquestionably deprived entertainers of their right to liberty protected by Ky. Const. §§ 1 and 11, not to mention their right to freely associate.

Suffice it to say that citizens of the Commonwealth of Kentucky have the right to associate for lawful purposes (including a husband being able to simply hold his wife's hand), and the freedom of liberty "presumes an autonomy of self. . . ." *Lawrence*, 539

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[49] *See, e.g., Allgeyer*,165 U.S. at 589 ("'liberty' mentioned in [the Fourteenth A]mendment means, not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free . . . ***to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation***") (emphasis and clarification added).

[50] In addition, what may textually be implied in the Federal Constitution is explicit in the Constitution of the Commonwealth of Kentucky. "All men . . . have certain inalienable rights, among which . . . [is] . . . the right of enjoying and defending their lives and liberties." Ky. Const. § 1.

U.S. at 562. Even the federal Due Process Clause extends protection of the right to associate with others. *See City of Chicago v. Morales*, 527 U.S. 41, 54 n.19 (1999). Short of conduct arising to a "harmful purpose," the right of persons to touch one-another in a non-unlawful manner cannot be precluded. *Id.* at 62. The Court of Appeals, of course, ignores this aspect of the unconstitutionality of this provision, arguing that the touching at issue here is "not protected expression[51]" therefore disagreeing "with the circuit court that the no-touch provision is overbroad." Apx. A, p. 87. These comments, while wrong in-and-of-themselves, say nothing about the liberty and associational rights at issue here.

CONCLUSION

Plaintiffs respectfully request this Honorable Court to reverse the ruling of the Court of Appeals. In addition, this Court should either hold Chapter 111 to be infirm under the Kentucky Constitution, or remand for full consideration of Plaintiffs' claims.

Dated: June 24, 2008

Respectfully Submitted,

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[51] Touching can be expressive, particularly here where it may occur in the context of an entertainment performance being undertaken by a particular dancer for a specific patron.

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